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Agenda item 5
Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

Note by the Secretary-General

1. At the 23rd meeting of its tenth emergency special session, on 8 December 2003, the General Assembly, by resolution ES-10/14, decided, in accordance with Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice to urgently render an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

2. On 9 July 2004, the International Court of Justice delivered its advisory opinion on the above question.

3. On 13 July 2004, I received the duly signed and sealed copy of this advisory opinion of the Court.

4. I hereby transmit to the General Assembly the advisory opinion given by the International Court of Justice on 9 July 2004, as well as the separate opinions and the declaration appended thereto, in the case concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory.

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INTERNATIONAL COURT OF JUSTICE

YEAR 2004

2004
9 July
General List
No. 131

9 July 2004

LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Activities of Assembly.

Events leading to the adoption of General Assembly resolution ES-10/14 requesting the advisory opinion.

Contention that General Assembly acted ultra vires *under the Charter — Article 12, paragraph 1, and Article 24 of the Charter — United Nations practice concerning the interpretation of Article 12, paragraph 1, of Charter — General Assembly did not exceed its competence.*

Request for opinion adopted by the Tenth Emergency Special Session of the General Assembly — Session convened pursuant to resolution 377 A (V) ("Uniting for Peace") — Conditions set by that resolution — Regularity of procedure followed.

Alleged lack of clarity of the terms of the question — Purportedly abstract nature of the question — Political aspects of the question — Motives said to have inspired the request and opinion's possible implications — "Legal" nature of question unaffected.

Court having jurisdiction to give advisory opinion requested.

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Discretionary power of Court to decide whether it should give an opinion.

Article 65, paragraph 1, of Statute — Relevance of lack of consent of a State concerned — Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly of concern to the United Nations — Possible effects of opinion on a political, negotiated solution to the Israeli-Palestinian conflict — Question representing only one aspect of Israeli-Palestinian conflict — Sufficiency of information and evidence available to Court — Useful purpose of opinion — Nullus commodum capere potest de sua injuria propria *— Opinion to be given to the General Assembly, not to a specific State or entity.*

No "compelling reason" for Court to use its discretionary power not to give an advisory opinion.

* *

"Legal consequences" of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term "wall".

Historical background.

Description of the wall.

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Applicable law.

United Nations Charter — General Assembly resolution 2625 (XXV) — Illegality of any territorial acquisition resulting from the threat or use of force — Right of peoples to self-determination.

International humanitarian law — Regulations annexed to the Fourth Hague Convention of 1907 — Fourth Geneva Convention of 1949 — Applicability of Fourth Geneva Convention in the Occupied Palestinian Territory — Human rights law — International Covenant on Civil and Political Rights — International Covenant on Economic, Social and Cultural Rights — Convention on the Rights of the Child — Relationship between international humanitarian law and human rights law — Applicability of human rights instruments outside national territory — Applicability of those instruments in the Occupied Palestinian Territory.

* *

Settlements established by Israel in breach of international law in the Occupied Palestinian Territory — Construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent — Risk of situation tantamount to de facto *annexation — Construction of the wall severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right.*

Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated régime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under the applicable provisions of international humanitarian law and human rights instruments.

Self-defence — Article 51 of the Charter — Attacks against Israel not imputable to a foreign State — Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control — Article 51 not relevant in the present case.

State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.

Construction of the wall and its associated régime are contrary to international law.

* *

Legal consequences of the violation by Israel of its obligations.

Israel's international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.

Legal consequences for States other than Israel — Erga omnes *character of certain obligations violated by Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.*

* *

Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — "Roadmap" — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.

ADVISORY OPINION

Present: *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; *Registrar* COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

Composed as above,

Gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

"*The General Assembly*,

Reaffirming its resolution ES-10/13 of 21 October 2003,

Guided by the principles of the Charter of the United Nations,

Aware of the established principle of international law on the inadmissibility of the acquisition of territory by force,

Aware also that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,

Recalling relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,

Recalling also the resolutions of the tenth emergency special session of the General Assembly,

Recalling further relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of

1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

Reaffirming the applicability of the Fourth Geneva Convention[1] as well as Additional Protocol I to the Geneva Conventions[2] to the Occupied Palestinian Territory, including East Jerusalem,

Recalling the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907[3],

Welcoming the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

Expressing its support for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

Recalling in particular relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

Recalling relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

Gravely concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

Gravely concerned also at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

Welcoming the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967[4], in particular the section regarding the wall,

Affirming the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

Having received with appreciation the report of the Secretary-General, submitted in accordance with resolution ES-10/13[5],

Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

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[1]United Nations, *Treaty Series*, Vol. 75, No. 973.

[2]*Ibid.*, Vol. 1125, No. 17512.

[3]See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

[4]E/CN.4/2004/6.

[5]A/ES-10/248."

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted

Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

11. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements accessible to the public, with effect from the opening of the oral proceedings.

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

For Palestine:	H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,
	Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,
	Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,
	Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,
	Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
	Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;
For the Republic of South Africa:	H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,
	Judge M. R. W. Madlanga, S.C.;
For the People's Democratic Republic of Algeria.	Mr. Ahmed Laraba, Professor of International Law;
For the Kingdom of Saudi Arabia:	H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;
For the People's Republic of Bangladesh:	H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;
For Belize:	Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);
For the Republic of Cuba:	H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;
For the Republic of Indonesia:	H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

For the Hashemite Kingdom of Jordan:	H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,
	Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal Adviser to the Government of the Hashemite Kingdom of Jordan;
For the Republic of Madagascar:	H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;
For Malaysia:	H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;
For the Republic of Senegal:	H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;
For the Republic of the Sudan:	H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;
For the League of Arab States:	Mr. Michael Bothe, Professor of Law, Head of the Legal Team;
For the Organization of the Islamic Conference:	H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference,
	Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

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13. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

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14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court has already had occasion to indicate that:

> "It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be

one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982,* pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion "on any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950,* p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I),* pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . ." and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

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18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting for Peace'" with a view to discussing "Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

> "the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security",

and condemned the "illegal Israeli actions" in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the "grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard" (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled "The situation in the Middle East, including the Palestine question". It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that "Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law" (para. 1). In paragraph 3, the Assembly requested the Secretary-General "to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .". The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the "report of the Secretary-General") was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it "*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

> "*Call[ed] on* the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security."

Neither the "Roadmap" nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d'affaires a.i. of the Permanent Mission of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present Advisory Opinion was adopted.

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24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

> "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

A request for an advisory opinion is not in itself a "recommendation" by the General Assembly "with regard to [a] dispute or situation". It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". In that regard it can impose on States "an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII" and can, to that end, "require enforcement by coercive action" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to "recommend measures for the peaceful adjustment" of various situations (*Certain Expenses of the United Nations, ibid.*, p. 163). "[T]he only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so." *(Ibid.)*.

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seised of the matter (*Official Records of the General Assembly, Fourth Session,* Ad Hoc *Political Committee, Summary Records of Meetings, 27 September-7 December 1949*, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21*, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89*, 202nd Meeting, 15 September 1947, pp. 2404-2405) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48*, 506th Meeting, 29 September 1950, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year*, S/PV.531, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council's agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the Twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment" (Twenty-third General Assembly, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that "The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention", and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the "Roadmap", before the adoption by the General Assembly of resolution ES-10/14, the Security Council

continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session's "rolling character" and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

> "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . ."

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of

the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular Session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 *(b)* of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a "resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (*I.C.J. Reports 1971*, p. 22, para. 20). In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a "legal question" for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the "legal consequences" of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a "legal" character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for "the General Assembly or some other organ of the United Nations", "Member States of the United Nations", "Israel", "Palestine" or "some combination of the above, or some different entity".

37. As regards the alleged lack of clarity of the terms of the General Assembly's request and its effect on the "legal nature" of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the "Fourth Geneva Convention") and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court's phrase in its Advisory Opinion on *Western Sahara*, "been framed in terms of law and raise[s] problems of international law"; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the "true legal question" under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that "the question put to the Court is, on the face of it, at once infelicitously expressed and vague" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely "identify the existing principles and rules, interpret them and apply them . . ., thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

> "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute'(*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J, Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that, "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*I.C.J. Reports 1980*, p. 87, para. 33). Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13). The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court *may* give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

> "the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of "compelling reasons" as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly "is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters". Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other

means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had "Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." The Court continued:

> "In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, "Differences of views . . . on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap" (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the "Roadmap", and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

> "It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another." *(I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

"two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfill their security responsibilities so that the peace process can succeed".

53. The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 72) and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46). Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put "raised a question of fact which could not be elucidated without hearing both parties" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*,

p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> "Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

* *

65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

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66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

67. As explained in paragraph 82 below, the "wall" in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem". As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

* *

70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

> "Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization." (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] 'a sacred trust of civilization'" (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and

implementation . . . of the Plan of Partition" of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that "an armistice shall be established in all sectors of Palestine" and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). Article III, paragraph 2, provided that "No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . ." It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the "Withdrawal of Israel armed forces from territories occupied in the recent conflict", and "Termination of all claims or states of belligerency".

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions "the principle that acquisition of territory by military conquest is inadmissible", condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

> "all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the "complete and united" capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void". It further decided "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem".

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States "with reference to the boundary definition under the Mandate as is shown in Annex I *(a)* . . . without prejudice to the status of any territories that came under Israeli military government control in 1967" (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the "territory that came under Israeli military government control in 1967", the line indicated "is the administrative boundary" with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

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79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter "Written Statement of the Secretary-General").

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . ." (Para. 4.) According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, "will form one continuous line stretching

720 kilometres along the West Bank". A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the "security fence" built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the "security fence" will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel's planned construction of a "security fence" following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

(1) a fence with electronic sensors;

(2) a ditch (up to 4 metres deep);

(3) a two-lane asphalt patrol road;

(4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;

(5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

* *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being

declaratory of the laws and customs of war" (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled "Summary Legal Position of the Government of Israel", it is stated that Israel does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory", citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt" and inferring that it is "not a territory of a High Contracting Party as required by the Convention".

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it "[was] not — as a depositary — in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession".

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

> "the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail."

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable." (See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed "that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967".

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict". Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".

Ten years later, the Security Council examined "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967". In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had "no legal validity" and affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". It called "*once more upon* Israel, as the occupying Power, to abide scrupulously" by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel

since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

> "The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949."

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

> "4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil and Political Rights. In those proceedings certain States had argued that "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

> "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question "whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction" for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that "the Covenant and similar instruments did not apply directly to the current situation in the occupied territories" (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed "to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

> "in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge".

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided "statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories". The Committee noted that, according to Israel, "the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant" (E/C.12/1/Add. 27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has "consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction" (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is "based on the well-established distinction between human rights and humanitarian law under international law". It added: "the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights" (E/1990/6/Add. 32, para. 5). In view of these observations, the Committee reiterated its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

* *

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that: "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force." In this connection, it was in particular emphasized that "The route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli settlements" illegally established on the Occupied

Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added: "As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

> "the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the

wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

> "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied

Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

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123. The construction of the wall also raises a number of issues in relation to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 *(g)* of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

> "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
>
> In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
>
> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.
>
> Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

According to Article 47:

"Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

Article 49 reads as follows:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

According to Article 52:

"No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."

Article 53 provides that:

"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or

cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

Lastly, according to Article 59:

"If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

"Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Mention must also be made of Article 12, paragraph 1, which provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

> "All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . ."

Article 13 further stated: "nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed".

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

> "the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum".

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for "the formulation of agreed plans and arrangements for such matters as either Party may submit to it" for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included "free access to the Holy Places".

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, "Each party will provide freedom of access to places of religious and historical significance."

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

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132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, "Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m." (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine", E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

> "an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival" (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier." (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence"

(Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public)*, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

> "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result" (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of

the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.

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138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary

international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

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143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

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144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or

expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that "the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations", and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

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147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general

international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails in practice the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a

legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

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161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

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163. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judges* Kooijmans, Buergenthal;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA, HIGGINS, KOOIJMANS and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BUERGENTHAL appends a declaration to the Advisory Opinion of the Court; Judges ELARABY and OWADA append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.Y.S.

(Initialled) Ph.C.

SEPARATE OPINION OF JUDGE KOROMA

Construction of wall and annexation — Validity of Court's jurisdiction — Functions of Court in advisory proceedings — Findings on basis of applicable law — Erga omnes *character of findings — Respect for humanitarian law — Role of General Assembly.*

1. While concurring with the Court's findings that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime are contrary to international law, I nevertheless consider it necessary to stress the following points.

2. First and foremost, the construction of the wall has involved the annexation of parts of the occupied territory by Israel, the occupying Power, contrary to the fundamental international law principle of the non-acquisition of territory by force. The Court has confirmed the Palestinian territories as occupied territory and Israel is therefore not entitled to embark there on activities of a sovereign nature which will change their status as occupied territory. The essence of occupation is that it is only of a temporary nature and should serve the interests of the population and the military needs of the occupying Power. Accordingly, anything which changes its character, such as the construction of the wall, will be illegal.

3. Understandable though it is that there may be a diversity of legal views and perspectives on the question submitted to the Court, namely, the rights and obligations of an occupying Power in an occupied territory and the remedies available under international law for breaches of those obligations — a question which, in my view, is eminently legal and falls within the advisory jurisdiction of the Court — the objection is not sustainable that the Court lacks competence to rule on such a question, as determined under the United Nations Charter (Art. 96 — functional co-operation on legal questions between the Court and the General Assembly), the Statute of the Court (Art. 65 — discretionary power; and Art. 68 — assimilation with contentious procedures), the Rules of Court (Art. 102, para. 2 — assimilation with contentious proceedings), and the settled jurisprudence of the Court. Also not sustainable is the objection based on judicial propriety, which the Court duly considered in terms of its competence and of fairness in the administration of justice. In this regard, the question put to the Court is not about the Israeli-Palestinian conflict as such, nor its resolution, but rather the legal consequences of the construction of the wall in the occupied territory. In other words, is it permissible under existing law for an occupying Power, unilaterally, to bring about changes in the character of an occupied territory? An eminently legal question, which, in my view, is susceptible of a legal response and which does not by necessity have to assume the nature of an adjudication of a bilateral dispute; it is a request for elucidation of the applicable law. It is to that question that the Court has responded. It was therefore appropriate for the Court to exercise its advisory jurisdiction in this matter. The jurisdictional basis of the Court's Advisory Opinion is thus firmly anchored in its jurisprudence.

4. The function of the Court in such proceedings is to ascertain and apply the law to the issue at hand. To reach its findings, the Court has applied the relevant rules of the international law of occupation as it pertains to the Palestinian territories. Applying these rules, the Court has found that the territories were occupied territory and thus not open to annexation; that any such annexation would be tantamount to a violation of international law and contrary to international peace. Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal. Moreover, in terms of contemporary international law, every State is under an obligation to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

5. The Court has also held that the right of self-determination as an established and recognized right under international law applies to the territory and to the Palestinian people. Accordingly, the exercise of such right entitles the Palestinian people to a State of their own as originally envisaged in resolution 181 (II) and subsequently confirmed. The Court has found that the construction of the wall in the Palestinian territory will prevent the realization of such a right and is therefore a violation of it.

6. With respect to humanitarian and human rights law, the Court has rightly adjudged that both these régimes are applicable to the occupied territories; that Israel as the occupying Power is under an obligation to respect the rights of the Palestinian population of the occupied territories. Accordingly, the Court has held that the construction of the wall in the occupied territories violates the régime of humanitarian and human rights law. To put an end to such violations, the Court has rightly called for the immediate cessation of the construction of the wall and the payment of reparation for damages caused by the construction.

7. Equally important is the finding that the international community as a whole bears an obligation towards the Palestinian people as a former mandated territory, on whose behalf the international community holds a "sacred trust", not to recognize any unilateral change in the status of the territory brought about by the construction of the wall.

8. The Court's findings are based on the authoritative rules of international law and are of an *erga omnes* character. The Court's response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings.

9. Just as important is the call upon the parties to the conflict to respect humanitarian law in the ongoing hostilities. While it is understandable that a prolonged occupation would engender resistance, it is nonetheless incumbent on all parties to the conflict to respect international humanitarian law at all times.

10. In making these findings, the Court has performed its role as the supreme arbiter of international legality and safeguard against illegal acts. It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for far too long but has caused enormous suffering to those directly involved and poisoned international relations in general.

(Signed) Abdul G. KOROMA.

SEPARATE OPINION OF JUDGE HIGGINS

Issues relevant for discretion not addressed by the Court — Elements lacking for a balanced opinion — Violations of Articles 46 and 52 of the Hague Regulations and Articles 49 and 53 of the Fourth Geneva Convention — Disagreement with passages in the Opinion on self-determination, self-defence and the erga omnes *principle — limitations of the factual materials relied on.*

1. I agree with the Opinion of the Court as regards its jurisdiction in the present case and believe that paragraphs 14-42 correctly answer the various contrary arguments that have been raised on this point.

2. The question of discretion and propriety is very much harder. Although ultimately I have voted in favour of the decision to give the Opinion, I do think matters are not as straightforward as the Court suggests. It is apparent (not least from the wording of the request to the Court) that an attempt has been made by those seeking the Opinion to assimilate the Opinion on the wall to that obtained from the Court regarding Namibia (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 12). I believe this to be incorrect for several reasons. First and foremost, there was already, at the time of the request for an opinion in 1971 on the legal consequences of certain acts, a series of Court Opinions on South West Africa which made clear what were South Africa's legal obligations (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23). Further, all the legal obligations as mandatory Power lay with South West Africa. There were no legal obligations, still less unfulfilled obligations, which in 1971 lay also upon South West Africa People's Organisation (SWAPO), as the representative of the Namibian people.

3. In the present case, it is the General Assembly, and not the Court, which has made any prior pronouncements in respect of legality. Further, in contrast to how matters stood as regards Namibia in 1971, the larger intractable problem (of which the wall may be seen as an element) cannot be regarded as one in which one party alone has been already classified by a court as the legal wrongdoer; where it is for it alone to act to restore a situation of legality; and where from the perspective of legal obligation there is nothing remaining for the other "party" to do. That is evident from the long history of the matter, and is attested to by Security Council resolutions 242 (1967) and 1515 (2002) alike.

4. In support of the misconceived analogy — which serves both to assist so far as legal issues of discretion are concerned, as well as wider purposes — counsel have informed the Court that "The problem . . . is a problem between one State — Israel — and the United Nations." (See for example, CR 2004/3, p. 62, para. 31.) Of course, assimilation to the *Namibia* case, and a denial of any dispute save as between Israel and the United Nations, would also avoid the necessity to meet the criteria enunciated by the Court when considering whether it should give an opinion where a dispute exists between two States. But, as will be elaborated below, this cannot be avoided.

5. Moreover, in the *Namibia* Opinion the Assembly sought legal advice on the consequences of its own necessary decisions on the matter in hand. The General Assembly was the organ in which now the power to terminate a League of Nations mandate was located. The Mandate was duly terminated. But Assembly resolutions are in most cases only recommendations. The Security Council, which in certain circumstances can pass binding resolutions under Chapter VII of the Charter, was not the organ with responsibility over mandates.

This conundrum was at the heart of the Opinion sought of the Court. Here, too, there is no real analogy with the present case.

6. We are thus in different legal terrain — in the familiar terrain where there is a dispute between parties, which fact does not of itself mean that the Court should not exercise its competence, provided certain conditions are met.

7. Since 1948 Israel has been in dispute, first with its Arab neighbours (and other Arab States) and, in more recent years, with the Palestinian Authority. Both Israel's written observations on this aspect (7.4-7.7) and the report of the Secretary-General, with its reference to the "Summary Legal Position" of "each side", attest to this reality. The Court has regarded the special status of Palestine, though not yet an independent State, as allowing it to be invited to participate in these proceedings. There is thus a dispute between two international actors, and the advisory opinion request bears upon one element of it.

8. That of itself does not suggest that the Court should decline to exercise jurisdiction on grounds of propriety. It is but a starting point for the Court's examination of the issue of discretion. A series of advisory opinion cases have explained how the *Status of Eastern Carelia, Advisory Opinion, 1923* (*P.C.I.J., Series B, No. 5*) principle should properly be read. Through the *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion,* (*I.C.J. Reports 1962*, p. 151); the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* (*I.C.J. Reports 1971*, p. 12); and, most clearly, the *Western Sahara, Advisory Opinion,* (*I.C.J. Reports 1975*, p. 12), the *ratio decidendi* of *Status of Eastern Carelia* has been explained. Of these the *Western Sahara* case provides by far the most pertinent guidance, as it involved a dispute between international actors, in which the Court had not itself already given several advisory opinions (cf. the *Namibia* Opinion, which was given against the background of three earlier ones on issues of legality).

9. The Court did not in the *Western Sahara* case suggest that the consent principle to the settlement of disputes in advisory opinions had now lost all relevance for all who are United Nations Members. It was saying no more than the particular factors underlying the *ratio decidendi* of *Status of Eastern Carelia* were not present. But other factors had to be considered to see if propriety is met in giving an advisory opinion when the legal interests of a United Nations Member are the subject of that advice.

10. Indeed, in the *Western Sahara* case the Court, after citing the oft quoted dictum from *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion,* that an opinion given to a United Nations organ "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950*, p. 71), went on to affirm that nonetheless:

> "lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
>
> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

11. What then are the conditions that in the *Western Sahara* case were found to make it appropriate for the Court to give an opinion even where a dispute involving a United Nations Member existed? One such was that a United Nations Member:

> "could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers" (*ibid.* p. 24, para. 30).

Although the Assembly is not exercising either the powers of a mandate supervisory body (as in *Namibia*) or a body decolonizing a non-self-governing territory (as in *Western Sahara*), the Court correctly recounts at paragraphs 48-50 the long-standing special institutional interest of the United Nations in the dispute, of which the building of the wall now represents an element.

12. There remains, however, a further condition to be fulfilled, which the Court enunciated in the *Western Sahara* case. It states that it was satisfied that:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39.)

In the present case it is the reverse circumstance that obtains. The request is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of our Opinion, to exercise powers over the dispute or controversy. Many participants in the oral phase of this case frankly emphasized this objective.

13. The Court has not dealt with this point at all in that part of its Opinion on propriety. Indeed, it is strikingly silent on the matter, avoiding mention of the lines cited above and any response as to their application to the present case. To that extent, this Opinion by its very silence essentially revises, rather than applies, the existing case law.

14. There is a further aspect that has been of concern to me so far as the issue of propriety is concerned. The law, history and politics of the Israel-Palestine dispute is immensely complex. It is inherently awkward for a court of law to be asked to pronounce upon one element within a multifaceted dispute, the other elements being excluded from its view. Context is usually important in legal determinations. So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight "with one hand behind their back" and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that context is important for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context.

15. Addressing the reality that "the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict", the Court states that it "is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give" (para. 54).

16. In fact, it never does so. There is nothing in the remainder of the Opinion that can be said to cover this point. Further, I find the "history" as recounted by the Court in paragraphs 71-76 neither balanced nor satisfactory.

17. What should a court do when asked to deliver an opinion on one element in a larger problem? Clearly, it should not purport to "answer" these larger legal issues. The Court, wisely and correctly, avoids what we may term "permanent status" issues, as well as pronouncing on the rights and wrongs in myriad past controversies in the Israel-Palestine problem. What a court faced with this quandary must do, is to provide a balanced opinion, made so by recalling the obligations incumbent upon all concerned.

18. I regret that I do not think this has been achieved in the present Opinion. It is true that in paragraph 162 the Court recalls that "Illegal actions and unilateral decisions have been taken on all sides" and that it emphasizes that "both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law". But in my view much, much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only "part of a greater whole", and then to take that circumstance "carefully into account". The call upon both parties to act in accordance with international humanitarian law should have been placed within the *dispositif*. The failure to do so stands in marked contrast with the path that the Court chose to follow in operative clause F of the *dispositif* of the *Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 266). Further, the Court should have spelled out what is required of both parties in this "greater whole". This is not difficult — from Security Council resolution 242 through to Security Council resolution 1515, the key underlying requirements have remained the same — that Israel is entitled to exist, to be recognized, and to security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State. Security Council resolution 1515 envisages that these long-standing obligations are to be secured, both generally and as to their detail, by negotiation. The perceptible tragedy is that neither side will act to achieve these ends prior to the other so doing. The Court, having decided that it was appropriate to exercise its jurisdiction, should have used the latitude available to it in an advisory opinion case, and reminded both parties not only of their substantive obligations under international law, but also of the procedural obligation to move forward simultaneously. Further, I believe that, in order to achieve a balanced opinion, this latter element should also have appeared in the *dispositif* itself.

19. I think the Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation.

20. My vote in favour of subparagraph (2) of the *dispositif* has thus been made with considerable hesitation. I have voted affirmatively in the end because I agree with almost all of what the Court has written in paragraphs 44-64. My regrets are rather about what it has chosen not to write.

* *

21. The way subparagraph (3) (A) of the *dispositif* is formulated does not separate out the various grounds that the Court relied on in reaching its conclusions. I have voted in favour of this paragraph because I agree that the wall, being built in occupied territory, and its associated régime, entail certain violations of humanitarian law. But I do not agree with several of the other stepping stones used by the Court in reaching this generalized finding, nor with its handling of the source materials.

22. The question put by the General Assembly asks the Court to respond by "considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions" (General Assembly resolution ES-10/14). It might have been anticipated that once the Court finds the Fourth Geneva Convention applicable, that humanitarian law would be at the heart of this Opinion.

23. The General Assembly has in resolution ES-10/13 determined that the wall contravenes humanitarian law, without specifying which provisions and why. Palestine has informed the Court that it regards Articles 33, 53, 55 and 64 of the Fourth Geneva Convention and Article 52 of the Hague Regulations as violated. Other participants invoked Articles 23 *(g)*, 46, 50 and 52 of the Hague Regulations, and Articles 27, 47, 50, 55, 56 and 59 of the Fourth Convention. For the Special Rapporteur, the wall constitutes a violation of Articles 23 *(g)* and 46 of the Hague Regulations and Articles 47, 49, 50, 53 and 55 of the Fourth Geneva Convention. It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal, as to *which* of these propositions is correct. Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.

24. It would also, as a matter of balance, have shown not only which provisions Israel has violated, but also which it has not. But the Court, once it has decided which of these provisions are in fact applicable, thereafter refers only to those which Israel has violated. Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court. Notwithstanding the very general language of subparagraph (3) (A) of the *dispositif*, it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention (para. 120), and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention (para. 132). I agree with these findings.

25. After its somewhat light treatment of international humanitarian law, the Court turns to human rights law. I agree with the Court's finding about the continued relevance of human rights law in the occupied territories. I also concur in the findings made at paragraph 134 as regards Article 12 of the International Covenant on Civil and Political Rights.

26. At the same time, it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court's response as regards the International Covenant on Civil and Political Rights notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel's duties in the occupied territories.

27. So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights . . ." (para. 134). For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.

28. The Court has also relied, for the general determination in subparagraph (3) (A) of the *dispositif*, on a finding that Israel is in violation of the law on self-determination. It follows observations on the legally problematic route of the wall and associated demographic risks with the statement "That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right." (Para. 122.) This appears to me to be a non sequitur.

29. There is a substantial body of doctrine and practice on "self-determination beyond colonialism". The United Nations Declaration on Friendly Relations, 1970, (General Assembly resolution 2625 (XXV)) speaks also of self-determination being applicable in circumstances where peoples are subject to "alien subjugation, domination, and exploitation". The General Assembly has passed many resolutions referring to the latter circumstance, having Afghanistan and the Occupied Arab Territories in mind (for example, General Assembly resolution 3236 (XXIX) 1974 (Palestine); General Assembly resolution 2144 (XXV) 1987 (Afghanistan)). The Committee on Human Rights has consistently supported this post-colonial view of self-determination.

30. The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective. I approve of the principle invoked, but am puzzled as to its application in the present case. Self-determination is the right of "All peoples . . . freely [to] determine their political status and freely pursue their economic, social and cultural development" (Article 1 (1), International Covenant on Civil and Political Rights and also International Covenant on Economic, Social and Cultural Rights). As this Opinion observes (para. 118), it is now accepted that the Palestinian people are a "peoples" for purposes of self-determination. But it seems to me quite detached from reality for the Court to find that it is the wall that presents a "serious impediment" to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than "the larger problem", which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.

31. Nor is this finding any more persuasive when looked at from a territorial perspective. As the Court states in paragraph 121, the wall does not at the present time constitute, *per se*, a *de facto* annexation. "Peoples" necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt, as is said in paragraph 78 of the Opinion, that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it. And to bring to an end that circumstance, it is necessary that both sides, simultaneously, accept their responsibilities under international law.

32. After the Court deals with the applicable law, and then applies it, it looks at possible qualifications, exceptions and defences to potential violations.

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (Merits, Judgment, I.C.J. Reports 1986*, p. 14). It there held that military action by irregulars could

constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251).

34. I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another". I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory — a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

36. The latter part of the *dispositif* deals with the legal consequences of the findings made by the Court.

37. I have voted in favour of subparagraph (3) (D) of the *dispositif* but, unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* (cf. paras. 154-159 of this Opinion). The Court's celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase*, (*Judgment, I.C.J. Reports 1970*, p. 32, para. 33) is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion, at paragraph 155. That dictum was directed to a very specific issue of jurisdictional *locus standi*. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/10 at p. 278), there are certain rights in which, by reason of their importance "all states have a legal interest in their protection". It has nothing to do with imposing substantive obligations on third parties to a case.

38. That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of *"erga omnes"*. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails "decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 115). The obligation upon United Nations Members not to recognize South Africa's illegal presence in Namibia, and not to lend support or assistance, relied in no way whatever on *"erga omnes"*. Rather, the Court emphasized that "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence." (*Ibid.*, para. 117.) The Court had already found in a contentious case that its determination of an illegal act "entails a legal consequence, namely that of

putting an end to an illegal situation" (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82). Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.

39. Finally, the invocation (para. 157) of "the *erga omnes*" nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the *erga omnes* principle", is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase "ensure respect" as going beyond legislative and other action within a State's own territory. It observes that

> "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war* (Pictet ed.) p. 16.)

It will be noted that the Court has, in subparagraph (3) (D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.

40. In conclusion, I would add that, although there has indeed been much information provided to the Court in this case, that provided directly by Israel has only been very partial. The Court has based itself largely on the Secretary-General's report from 14 April 2002 to 20 November 2003 and on the later Written Statement of the United Nations (see para. 79). It is not clear whether it has availed itself of other data in the public domain. Useful information is in fact contained in such documents as the Third Report of the current Special Rapporteur and Israel's Reply thereto (E/CN.4/2004/6/Add.1), as well as in "The Impact of Israel's Separation Barrier on Affected West Bank Communities: an Update to the Humanitarian and Emergency Policy Group (HEPG), Construction of the Barrier, Access, and its Humanitarian Impact, March 2004". In any event, the Court's findings of law are notably general in character, saying remarkably little as concerns the application of specific provisions of the Hague Rules or the Fourth Geneva Convention along particular sections of the route of the wall. I have nonetheless voted in favour of subparagraph (3) (A) of the *dispositif* because there is undoubtedly a significant negative impact upon portions of the population of the West Bank, that cannot be excused on the grounds of military necessity allowed by those Conventions; and nor has Israel explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected.

(Signed) Rosalyn HIGGINS.

SEPARATE OPINION OF JUDGE KOOIJMANS

Reasons for negative vote on operative subparagraph (3) (D) — Background and context of request for advisory opinion — Need for balanced treatment — Jurisdictional issues — Article 12, paragraph 2, of the Charter and General Assembly resolution 377 A (V) — Question of judicial propriety — Purpose of request — Merits — Self-determination — Proportionality — Self-defence — Legal consequences — Obligations for other States — Article 41 of the International Law Commission Articles on State Responsibility — Duty of non-recognition — Duty of abstention — Duty to ensure respect for humanitarian law — Common Article 1 of the Geneva Conventions.

I. Introductory remarks

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

My motives can be summarized as follows:

First: the request as formulated by the General Assembly did not make it necessary for the Court to determine the obligations for States which ensue from the Court's findings. In this respect an analogy with the structure of the Opinion in the *Namibia* case is not appropriate. In that case the question about the legal consequences for States was at the heart of the request and logically so since it was premised on a decision of the Security Council. That resolution, and in particular its operative paragraph 5 which was addressed to "all States", was considered by the Court to be "essential for the purposes of the present advisory opinion" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 51, para. 108).

A similar situation does not exist in the present case, where the Court's view is not asked on the legal consequences of a decision taken by a political organ of the United Nations but of an act committed by a Member State. That does not prevent the Court from considering the issue of consequences for third States once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request.

It is, however, this reasoning that in my view is not persuasive (see paras. 39-49, below) and this was my second motive for casting a negative vote.

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

2. Although I am in general agreement with the Court's Opinion, on some issues I have reservations with regard to its reasoning. I will, in giving my comments, follow the logical order of the Opinion:

(a) jurisdictional issues;

(b) the question of judicial propriety;

(c) the merits;

(d) the legal consequences.

Before doing so I wish, however, to make some remarks about the background and context of the request.

II. Background and context of the request for the advisory opinion

3. In paragraph 54 of the Opinion the Court observes (in the context of judicial propriety) that it is aware that the question of the wall is part of a greater whole but that that cannot be a reason for it to decline to reply to the question asked. It adds that this wider context will be carefully taken into account. I fully share the Court's view as laid down in that paragraph including the Court's observation that it can nevertheless only examine other issues to the extent that is necessary for the consideration of the question put to it.

4. In my opinion the Court could and should have given more explicit attention to the general context of the request in its Opinion. The situation in and around Palestine has been for a number of decades not only a virtually continuous threat to international peace and security but also a human tragedy which in many respects is mind-boggling. How can a society like the Palestinian one get used to and live with a situation where the victims of violence are often innocent men, women and children? How can a society like the Israeli society get used to and live with a situation where attacks against a political opponent are targeted at innocent civilians, men, women and children, in an indiscriminate way?

5. The construction of the wall is explained by Israel as a necessary protection against the latter category of acts which are generally considered to be international crimes. Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.

Every State, including Israel, has the right and even the duty (as the Court says in paragraph 141) to respond to such acts in order to protect the life of its citizens, albeit the choice of means in doing so is limited by the norms and rules of international law. In the present case, Israel has not respected those limits, and the Court convincingly demonstrates that these norms and rules of international law have not been respected by it. I find no fault with this conclusion nor with the finding that the construction of the wall along the chosen route has greatly added to the suffering of the Palestinians living in the Occupied Territory.

6. In paragraph 122 the Court finds that the construction of the wall, along with measures taken earlier, severely impedes the exercise by the Palestinian people of its right to self-determination, and therefore constitutes a breach of Israel's obligation to respect that right. I have doubts whether the last part of that finding is correct (see para. 32, below), but it is beyond doubt that the mere existence of a structure that separates the Palestinians from each other makes the realization of their right to self-determination far more difficult, even if it has to be admitted that the realization of this right is more dependent upon political agreement than on the situation *in loco*.

But it is also true that the terrorist acts themselves have caused "great harm to the legitimate aspirations of the Palestinian people for a better future", as was stated in the Middle East Quartet Statement of 16 July 2002.

And the Statement continues: "Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis." (MWP 2004/38, Add., Annex 10.)

7. The fact that the Court has limited itself to report merely on a number of the historical facts which have led to the present human tragedy may be correct from the viewpoint of what is really needed to answer the request of the General Assembly: the result, however, is that the historical résumé, as presented in paragraphs 70 to 78, is rather two-dimensional. I will illustrate this by giving one example which is hardly relevant for the case itself.

8. Before giving its historical résumé, the Court says that it will first make a brief analysis of the status of the territory and it starts by mentioning the establishment of the Mandate after the First World War. Nothing is said, however, about the status of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the occupation by Israel in 1967, in spite of the fact that it is a generally known fact that it was placed by Jordan under its sovereignty but that this claim to sovereignty, which was relinquished only in 1988, was recognized by three States only.

9. I fail to understand the reason for this omission of an objective historical fact since in my view the fact that Jordan claimed sovereignty over the West Bank only strengthens the argument in favour of the applicability of the Fourth Geneva Convention right from the moment of its occupation by Israel in June 1967.

If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is — once occupied by the other party — by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

That this at the time also was recognized by the Israeli authorities is borne out by the Order issued after the occupation and referred to in paragraph 93 of the Opinion.

10. The strange result of the Court's reticence about the status of the West Bank between 1949 and 1967 is that it is only by implication that the reader is able to understand that it was under Jordanian control (paragraphs 73 and 129 refer to the demarcation line between Israel and Jordan (the Green Line)) without ever being explicitly informed that the West Bank had been placed under Jordanian authority. This is all the more puzzling as the Court would in no way have been compelled to comment on the legality or legitimacy of that authority if it had made mention of it.

11. In a letter of 29 January from the Deputy Director General and Legal Adviser of the Israeli Ministry of Foreign Affairs to the Registrar of the Court it is stated that "Israel trusts and expects that the Court will look beyond the request to the wider issues relevant to this matter" (MWP 2004/38, covering letter). In this respect it was said that resolution ES-10/14 is "absolutely silent" on the terrorist attacks against Israeli citizens and thus "reflects the gravest prejudice and imbalance with the requesting organ". Israel, therefore, requested the Court not to render the opinion.

12. I am of the view that the Court, in deciding whether it is appropriate to respond to a request for an advisory opinion, can involve itself with the political debate which has preceded the request only to the extent

necessary to understand the question put. It is no exception that such debate is heated but, as the Court said in the case of the *Legality of the Threat or Use of Nuclear Weapons*

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

The Court, however, does not function in a void. It is the principal judicial organ of the United Nations and has to carry out its function and responsibility within the wider political context. It cannot be expected to present a legal opinion on the request of a political organ without taking full account of the context in which the request was made.

13. Although the Court certainly has taken into account the arguments put forward by Israel and has dealt with them in a considerate manner, I am of the view that the present Opinion could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts which can be found at several places in the Opinion, are in my view not sufficient for this purpose. An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process. It should therefore throughout its reasoning and up till the operative part reflect the legitimate interests and responsibilities of *all* those involved and not merely refer to them in a concluding paragraph (para. 162).

III. Jurisdictional issues

14. I fully share the view of the Court that the adoption of resolution ES-10/14 was not *ultra vires* since it did not contravene the provision of Article 12, paragraph 1, of the Charter; nor did it fail to fulfil the essential conditions set by the Uniting for Peace resolution (res. 377 A (V)) for the convening of an Emergency Special Session.

15. I doubt, however, whether it is possible to describe the practice of the political organs of the United Nations with respect to the interpretation of Article 12, paragraph 1, of the Charter without taking into account the effect of the Uniting for Peace resolution on this interpretation. In the Opinion, the Court deals with resolution 377 A (V) as a separate item and merely in relation to its procedural requirements. In my opinion this resolution also had a more substantive effect, namely with regard to the interpretation of the relationship between the competences of the Security Council and the General Assembly respectively, in the field of international peace and security and has certainly expedited the development of the interpretation of the condition, contained in Article 12, paragraph 1, namely that the Assembly shall not make a recommendation with regard to a dispute or situation *while* the Security Council is exercising its functions in respect of such dispute or situation (emphasis added).

16. This effect is also recognized in doctrine. "Le vote de la résolution 'Union pour le maintien de la paix' . . . ne pourrait manquer d'avoir des effets sur la portée à donner à la restriction de l'article 12, paragraphe 1." (Philippe Manin in J. P. Cot, *La Charte des Nations Unies*, 2e éd., 1981, p. 298; see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, p. 46.) In actual practice the adoption of the Uniting for Peace resolution has contributed to the interpretation that, if a veto cast by a permanent member prevents the Security Council from taking a decision, the latter is no longer considered to be exercising its functions within the meaning of Article 12, paragraph 1. And the fact that a veto had been

cast when the Security Council voted on a resolution dealing with the construction of the wall is determinative for the conclusion that the Security Council was no longer exercising its functions under the Charter with respect to the construction of the wall. In the present case, therefore, the conclusion that resolution ES-10/14 did not contravene Article 12, paragraph 1, of the Charter cannot be dissociated from the effect resolution 377 A (V) has had on the interpretation of that provision.

17. That such practice is accepted by both Assembly and Security Council also with regard to the procedural requirements of resolution 377 A (V) is borne out by the fact that none of the Council's members considered that the reconvening of the Assembly in Emergency Special Session on 20 October 2003 was unconstitutional and that the adoption of the resolution demanding that Israel stop and reverse the construction of the wall was therefore *ultra vires*. In this respect it is telling that this resolution (res. ES-10/13) was tabled as a compromise by the Presidency of the European Union, among whose members were two permanent and two non-permanent members of the Security Council, less than a week after a draft resolution on the same subject had been vetoed in the Council.

18. Let me add that I agree with the Court that there has developed a practice enabling the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. I doubt, however, whether a resolution of the character of resolution ES-10/13 (which beyond any doubt is a recommendation in the sense of Article 12, paragraph 1) could have been lawfully adopted by the Assembly, whether in a regular session or in an Emergency Special Session, if the Security Council had been considering the specific issue of the construction of the wall without yet having taken a decision.

IV. The question of judicial propriety

19. I must confess that I have felt considerable hesitation as to whether it would be judicially proper to comply with the request of the Assembly.

20. This hesitation had first of all to do with the question whether the Court would not be unduly politicized by giving the requested advisory opinion, thereby undermining its ability to contribute to global security and to respect for the rule of law. It must be admitted that such an opinion, whatever its content, will inevitably become part of an already heated political debate. The question is in particular pertinent as three members of the Quartet (the United States, the Russian Federation and the European Union) abstained on resolution ES-10/14 and do not seem too eager to see the Court complying with the request out of fear that the opinion may interfere with the political peace process. Such fears cannot be taken lightly since the situation concerned is a continuous danger for international peace and security and a source of immense human suffering.

21. While recognizing that the risk of a possible politicization is real, I nevertheless concluded that this risk would not be neutralized by a refusal to give an opinion. The risk should have been a consideration for the General Assembly when it envisaged making the request. Once the decision to do so had been taken, the Court was made an actor on the political stage regardless of whether it would or would not give an opinion. A refusal would just as much have politicized the Court as the rendering of an opinion. Only by limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected.

22. My hesitation was also related to the question of the object of the Assembly's request. What was the Assembly's purpose in making the request? Resolution ES-10/14 seems to give some further information in this respect in its last preambular paragraph which reads as follows:

> "Bearing in mind that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences . . ."

Evidently the Assembly finds it necessary to take speedy action to bring to an end these detrimental implications and consequences and for this purpose it needs the views of the Court.

But the question remains: Views on what? And why the views of a judicial body on an act which has already been determined not to be in conformity with international law and the perpetrator of which has already been called upon to terminate and reverse its wrongful conduct (res. ES-10/13)?

23. The present request recalls the dilemma as seen by Judge Petrén in the *Namibia* case. He felt that the purpose of the request for an advisory opinion was in that case "above all to obtain from the Court a reply such that States would find themselves under obligation to bring to bear on South Africa pressure . . .". He called this a reversal of the natural distribution of roles as between the principal judicial organ and the political organ of the United Nations since, instead of asking the Court its opinion on a legal question in order to deduce the political consequences following from it, the opposite was done (*I.C.J. Reports 1971*, p. 128).

24. In the present Opinion the Court responds to the argument that the Assembly has not made clear what use it would make of an advisory opinion on the wall, with a reference to the *Nuclear Weapons* case where it said that "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (Para. 61.) And the Court continues that it "cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly" (para. 62).

25. I do not consider this answer fully satisfactory. There is quite a difference between substituting the Court's assessment of the usefulness of the opinion for that of the organ requesting it and analysing from a judicial viewpoint what the purpose of the request is. The latter is a simple necessity in order to find out what the Court as a judicial body is in a position to say. And from that point of view the request is phrased in a way which can be called odd, to put it mildly. And in actual fact the Court makes this analysis when in paragraph 39 of the Opinion it says that the use of the terms "legal consequences" arising from the construction of the wall "necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law". I agree with that statement but not because the word "necessarily" is related to the terms of the request but because it is related to the judicial responsibility of the Court. To quote the words of Judge Dillard in the *Namibia* case:

> "when these [political] organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function *precludes* it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral . . ." (*I.C.J. Reports 1971*, p. 151; emphasis added.)

26. In the present case the request is far from being "legally neutral". In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity. The Court has done so but in my view it should have done so *proprio motu* and not by assuming what the Assembly "necessarily" must have assumed, something it evidently did not.

27. Let me add that in other respects I share the views the Court has expressed with regard to the issue of judicial propriety. In particular the Court's finding that the subject-matter of the General Assembly cannot be regarded as being "only a bilateral matter between Israel and Palestine" (para. 49), is in my view worded in a felicitous way since, in regard to the issue of the existence of a bilateral dispute, it avoids the dilemma of "either/or". A situation which is of legitimate concern to the organized international community and a bilateral dispute with regard to that same situation may exist simultaneously. The existence of the latter cannot deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments. In the present case the involvement of the United Nations in the question of Palestine is a long-standing one and, as the Court says, the subject-matter of the request is of acute concern to the United Nations (para. 50). By giving an opinion the Court therefore in no way circumvents the principle of consent to the judicial settlement of a bilateral dispute which exists simultaneously. The bilateral dispute cannot be dissociated from the subject-matter of the request, but only in very particular circumstances which cannot be spelled out in general can its existence be seen as an argument for the Court to decline to reply to the request. In this respect, I find the quotation from the *Western Sahara* Opinion in paragraph 47 of the Opinion, which contains pure circular reasoning, less than helpful.

28. If the request has been legitimately made in view of the United Nations long-standing involvement with the question of Palestine, Israel's argument that the Court does not have at its disposal the necessary evidentiary material, as this is to an important degree in the hands of Israel as a party to the dispute, does not hold water. The Court has to respect Israel's choice not to address the merits, but it is the Court's own responsibility to assess whether the available information is sufficient to enable it to give the requested opinion. And, although it is a matter for sincere regret that Israel has decided not to address the merits, the Court is right when it concludes that the available material allows it to give the opinion.

V. Merits

29. I share the Court's view that the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the 1989 Convention on the Rights of the Child are applicable to the Occupied Palestinian Territory and that Israel by constructing the wall and establishing the associated régime has breached its obligation under certain provisions of each of these conventions.

I find no fault with the Court's reasoning in this respect although I regret that the summary of the Court's findings in paragraph 137 does not contain a list of treaty provisions which have been breached.

30. The Court has refrained from taking a position with regard to territorial rights and the question of permanent status. It has taken note of statements, made by Israeli authorities on various occasions, that the "fence" is a temporary measure, that it is not a border and that it does not change the legal status of the territory. I welcome these assurances which may be seen as the recognition of legal commitments on the side of Israel but share the Court's concern that the construction of the wall creates a fait accompli. It is therefore all the more important to expedite the political process which has to settle all territorial and permanent status issues.

31. *Self-determination* — In my view, it would have been better if the Court had also left issues of self-determination to this political process. I fully recognize that the right of self-determination is one of the basic principles of modern international law and that the realization of this right for the people of Palestine is one of the most burning issues for the solution of the Israeli-Palestinian conflict. The overriding aim of the political process, as it is embodied *inter alia* in the Roadmap, is "the emergence of an independent, democratic and viable Palestinian State living side by side in peace and security with Israel and its other neighbours" (dossier Secretary-General, No. 70). This goal is subscribed to by both Israel and Palestine; both are, therefore, in good faith bound to desist from acts which may jeopardize this common interest.

32. The right of self-determination of the Palestinian people is therefore imbedded in a much wider context than the construction of the wall and has to find its realization in this wider context. I readily agree with the Court that the wall and its associated régime impede the exercise by the Palestinian people of its right to self-determination be it only for the reason that the wall establishes a physical separation of the people entitled to enjoy this right. But not every impediment to the exercise of a right is by definition a breach of that right or of the obligation to respect it, as the Court seems to conclude in paragraph 122. As was said by the Quartet in its statement of 16 July 2002, the terrorist attacks (and the failure of the Palestinian Authority to prevent them) cause also great harm to the legitimate aspirations of the Palestinian people and thus seriously impede the realization of the right of self-determination. Is that also a breach of that right? And if so, by whom? In my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians' right to self-determination without further legal analysis.

33. In this respect I do not find the references to earlier statements of the Court in paragraph 88 of the Opinion very enlightening. In the *Namibia* case the Court referred in specific terms to the relations between the inhabitants of a mandate and the mandatory as reflected in the constitutive instruments of the mandate system. In the *East Timor* case the Court called the rights of peoples to self-determination in a colonial situation a right *erga omnes*, therefore a right opposable to all. But it said nothing about the way in which this "right" must be translated into obligations for States which are not the colonial Power. And I repeat the question: Is every impediment to the exercise of the right to self-determination a breach of an obligation to respect it? Is it so only when it is serious? Would the discontinuance of the impeding act restore the right or merely bring the breach to an end?

34. *Proportionality* — The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.

35. *Self-defence* — Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 and 1373 refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 and 1373 and that consequently Article 51 of the Charter cannot be invoked by Israel.

IV. Legal consequences

37. I have voted in favour of subparagraph (3) (B), (C) and (E) of the operative part. I agree with the Court's finding with regard to the consequences of the breaches by Israel of its obligations under international law for Israel itself and for the United Nations (paras. 149-153 and 160). Since I have voted, however, against operative subparagraph (3) (D), the remainder of my opinion will explain the reasons for my dissent in a more detailed way than I did in my introductory remarks.

38. The General Assembly requests the Court to specify what are the legal consequences arising from the construction of the wall. If the object of the request is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions (para. 50) it is only logical that a specific paragraph of the *dispositif* is addressed to the General Assembly. That the paragraph is also addressed to the Security Council is logical as well in view of the shared or parallel responsibilities of the two organs.

Since the Court has found that the construction of the wall and the associated régime constitute breaches of Israel's obligations under international law, it is also logical that the Court spells out what are the legal consequences for Israel.

39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the *Namibia* case where the question was exclusively focussed on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council.

In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the *Namibia* case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.)
>
> 2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.

41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states "What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "co-operation . . . in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which — virtually without exception — take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125.)

46. Finally, I have difficulty in accepting the Court's finding that the States parties to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel with humanitarian law as embodied in that Convention (para. 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Convention which reads: "The High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances." (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, "The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit" in *Yearbook of International Humanitarian Law*, Vol. 2 (1999), p. 3-61). His conclusion from the *travaux préparatoires* is:

> "I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances'." (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the ICRC in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.

49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its

reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic demarches.

51. For all these reasons I felt compelled to vote against operative subparagraph (3) (D).

(Signed) Pieter H. KOOIJMANS.

SEPARATE OPINION OF JUDGE AL-KHASAWNEH

Concurs with Advisory Opinion — Agrees in general with reasoning — Separate opinion only aim is to elucidate some salient points — Status of territories as occupied rests on consistent opinio juris *— Security Council and General Assembly resolutions — Opinion of High Contracting Parties to Fourth Geneva Convention — Position of ICRC — Position of States — Israeli recognition of applicability of Fourth Geneva Convention — Recent Israeli court decisions — Court however not content to merely reiterate such conclusion — Court independently reached similar conclusions on basis of interpretation of Fourth Geneva Convention — Court saw no reason to embark on ascertainment of prior legal status of occupied territories — Wise decision both as unnecessary and as having no impact on present status — Except in case those territories were* terra nullius *— Cannot be the case — Concept discredited and inapplicable to today's world — Incompatible with territory as mandatory territory — Principles of non-annexation and welfare of inhabitants continue even after termination of mandate — Until right of self-determination is achieved — Obstacle to that right now is prolonged Israeli occupation — Green Line originally an armistice line — Israeli jurists sought to give it more importance before 1967 war — Regardless of its present situation it represents the point from which Israeli occupation can be measured — Doubts about its status work both ways — Court right to refer to negotiation — Negotiations are means and not end — They should be grounded in law — Requirement of good faith should be reflected in abstaining from faits accomplis that prejudice outcome of negotiations.*

1. I concur with the Court's findings and agree in general with its reasoning. Certain salient points in the Advisory Opinion merit some elucidation and it is specifically with regard to those points that I append this opinion.

The international legal status of the territories presently under Israeli occupation

2. Few propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid *opinio juris* as the proposition that Israel's presence in the Palestinian territory of the West Bank including East Jerusalem and Gaza is one of military occupation governed by the applicable international legal régime of military occupation.

3. In support of this, one may cite the very large number of resolutions adopted by the Security Council and the General Assembly often unanimously or by overwhelming majorities, including binding decisions of the Council and other resolutions which, while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*. In all of these resolutions the territory in question was unfalteringly characterized as occupied territory; Israel's presence in it as that of a military occupant and Israel's compliance or non-compliance with its obligations towards the territory and its inhabitants measured against the objective yardstick of the protective norms of humanitarian law.

4. Similarly the High Contracting Parties to the Fourth Geneva Convention and the International Committee of the Red Cross "have retained their consensus that the convention", i.e. the Fourth Geneva Convention of 12 August 1949, "does apply *de jure* to the occupied territories"[1].

[1] Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/2 of 25 April 1997, para. 21, A/165-10/6-S/1997/494.

5. This has also been the position of States individually or in groups including States friendly to Israel. Indeed a review of the record would reveal that, as noted by France in its Written Statement:

> "Israel initially recognized the applicability of the Fourth Convention: according to Article 35 of Order No. 1, issued by the occupying authorities on 7 June 1967, '[t]he Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949, Relative to the Protection of Civilians in Time of War, with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail . . .'" (P. 5.)

6. More recently Israel's Supreme Court has confirmed the applicability of the Fourth Geneva Convention to those territories.

7. Whilst "that consistent record of the international community's *opinio juris* cannot just be swept aside and ignored[2]", the Court did not simply reiterate that *opinio juris*, instead, while taking cognizance of it, the Court arrived at similar conclusions regarding the *de jure* applicability of the Fourth Geneva Convention mainly on the basis of a textual interpretation of the Convention itself (paras. 86-101). Paragraph 101 reads:

> "In conclusion, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contending Parties. Israel and Jordan were parties to the Fourth Convention when the 1967 armed conflict broke out. The Court accordingly finds that the convention is applicable in the Palestinian territories which before the conflict lay to the east of the 1949 Armistice Demarcation line established between Israel and Jordan (The Green Line) and which were occupied during that conflict by Israel, there being no need for any enquiry into the precise prior status of these territories."

8. The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of establishing their present status as occupied territories and affirming the *de jure* applicability of the Fourth Geneva Convention to them, but also because the prior status of the territories would make no difference whatsoever to their present status as occupied territories except in the event that they were *terra nullius* when they were occupied by Israel, which no one would seriously argue given that that discredited concept is of no contemporary application, besides being incompatible with the territories' status as a former mandatory territory regarding which, as the Court had occasion to pronounce "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] 'a sacred trust of civilization'" *(International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950,* p. 131).

9. Whatever the merits and demerits of the Jordanian title in the West Bank might have been, and Jordan would in all probability argue that its title there was perfectly valid and internationally recognized and point out that it had severed its legal ties to those territories in favour of Palestinian self-determination, the fact remains that what prevents this right of self-determination from being fulfilled is Israel's prolonged military occupation with its policy of creating faits accomplis on the ground. In this regard it should be recalled that the principle of non-annexation is not extinguished with the end of the mandate but subsists until it is realized.

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[2] Sir Arthur Watts, CR 2003/3, p. 64.

The significance of the Green Line

10. There is no doubt that the Green Line was initially no more than an armistice line in an agreement that expressly stipulated that its provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties" and that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto" (Advisory Opinion, para. 72).

11. It is not without irony that prominent Israeli jurists were arguing before the 1967 war that the General Armistice agreements were *sui generis*, were in fact more than mere armistice agreements, could not be changed except with the acceptance of the Security Council. Whatever the true significance of that line today, two facts are indisputable:

(1) The Green line, to quote Sir Arthur Watts, "is the starting line from which is measured the extent of Israel's occupation of non-Israeli territory" (CR 2004/3, p. 64). There is no implication that the Green Line is to be a permanent frontier.

(2) Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question. Ultimately it is through stabilizing its legal relationship with the Palestinians and not through constructing walls that its security would be assured.

The role of negotiations

12. The Court has included a reference to the tragic situation in the Holy Land . A situation that can be brought to an end "only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The Roadmap approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end." (Advisory Opinion, para. 162.)

13. Whilst there is nothing wrong in calling on protagonists to negotiate in good faith with the aim of implementing Security Council resolutions and while recalling that negotiations have produced peace agreements that represent defensible schemes and have withstood the test of time, no one should be oblivious that negotiations are a means to an end and cannot in themselves replace that end. The discharge of international obligations including *erga omnes* obligations cannot be made conditional upon negotiations. Additionally, it is doubtful, with regard to the Roadmap, when consideration is had to the conditions of acceptance of that effort, whether the meeting of minds necessary to produce mutual and reciprocal obligations exists. Be that as it may, it is of the utmost importance if these negotiations are not to produce non-principled solutions, that they be grounded in law and that the requirement of good faith be translated into concrete steps by abstaining from creating faits accomplis on the ground such as the building of the wall which cannot but prejudice the outcome of those negotiations.

(Signed) Awn AL-KHASAWNEH.

DECLARATION OF JUDGE BUERGENTHAL

1. Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree. However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case. In reaching this conclusion, I am guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46). In my view, the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits.

2. I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. It is equally true with regard to the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (para. 122). I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,

which declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific segments of the wall, their defensive needs and related topographical considerations.

Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows:

> "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." (Para. 139.)

6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State. Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ." Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). In its resolution 1368 (2001), adopted only one day after the September 11, 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. (See Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839-840.)

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied

Palestinian Territory — whatever the concept of "control" means given the attacks Israel is subjected from that territory — or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.

7. In summarizing its finding that the wall violates international humanitarian law and international human rights law, the Court has the following to say:

> "To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments." (Para. 137.)

The Court supports this conclusion with extensive quotations of the relevant legal provisions and with evidence that relates to the suffering the wall has caused along some parts of its route. But in reaching this conclusion, the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. It is true that in dealing with this subject the Court asserts that it draws on the factual summaries provided by the United Nations Secretary-General as well as some other United Nations reports. It is equally true, however, that the Court barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court claims to rely on. Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General, A/ES-10/248, p. 8, the Secretary-General reports Israel's position on this subject in part as follows: "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status." The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).

9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

10. A final word is in order regarding my position that the Court should have declined, in the exercise of its discretion, to hear this case. In this connection, it could be argued that the Court lacked many relevant facts bearing on Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This proposition would be valid if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. But that is not the rule applicable to advisory opinion proceedings which have no parties. Once the Court recognized that Israel's consent to these proceedings was not necessary since the case was not bought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. While I have my own views on whether it was wise for Israel not to produce the requisite information, this is not an issue for me to decide. The fact remains that it did not have that obligation. The Court may therefore not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping legal conclusions.

(Signed) Thomas BUERGENTHAL.

SEPARATE OPINION OF JUDGE ELARABY

The nature and scope of United Nations responsibility — The international legal status of the Occupied Palestinian Territory — Historical survey — The law of belligerent occupation, including current situation of prolonged occupation, principle of military necessity, breaches of international humanitarian law and the erga omnes *right to self-determination of the Palestinian people.*

I would like to express, at the outset, my complete and unqualified support for the findings and conclusions of the Court. I consider it necessary, however, to exercise my entitlement under Article 57 of the Statute, to append this separate opinion to elaborate on some of the historical and legal aspects contained in the Advisory Opinion.

I feel obliged, with considerable reluctance, to start by referring to paragraph 8 of the Advisory Opinion. In my view, as Judge Lachs wrote in his separate opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment*, "A judge — as needs no emphasis — is bound to be impartial, objective, detached, disinterested and unbiased." (*I.C.J. Reports 1986*, p. 158.) Throughout the consideration of this Advisory Opinion, I exerted every effort to be guided by this wise maxim which has a wider scope than the solemn declaration every judge makes in conformity with Article 20 of the Statute of the International Court of Justice.

In this separate opinion, I will address three interrelated points:

(i) the nature and scope of the United Nations responsibility;

(ii) the international legal status of the Occupied Palestinian Territory;

(iii) the law of belligerent occupation.

I. The Nature and Scope of the United Nations Responsibility

1. The first point to be emphasized is the need to spell out the nature and the wide-ranging scope of the United Nations historical and legal responsibility towards Palestine. Indeed, the Court has referred to this special responsibility when it held that:

> "The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine . . . this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people." (Advisory Opinion, para. 49.)

What I consider relevant to emphasize is that this special responsibility was discharged for five decades without proper regard for the rule of law. The question of Palestine has dominated the work of the United Nations since its inception, yet no organ has ever requested the International Court of Justice to clarify the complex legal aspects of the matters under its purview. Decisions with far-reaching consequences were taken on the basis of political expediency, without due regard for the legal requirements. Even when decisions were adopted, the will to follow through to implementation soon evaporated. Competent United Nations organs, including the General Assembly and the Security Council, have adopted streams of resolutions that remain

wholly or partially unfulfilled. The United Nations special responsibility has its origin in General Assembly resolution 118 (II) of 29 November 1947 (hereafter, the Partition Resolution).

Proposals to seek advisory opinions prior to the adoption of the Partition Resolution were considered on many occasions in the competent subsidiary bodies but no request was ever adopted. This fact by itself confers considerable importance on the request for an advisory opinion embodied in General Assembly resolution ES-10/14 (A/ES-10/L.16), adopted on 8 December 2003, at the 23rd meeting of the resumed Tenth Emergency Special Session. The request is indeed a landmark in the United Nations consideration of the question of Palestine. The historical record of some previous attempts to seek the views of the International Court of Justice deserves to be recalled, albeit briefly.

The report of the Sub-Committee 2 in 1947 to the *Ad Hoc* Committee on the Palestinian Question recognized the necessity to clarify the legal issues. In paragraph 38, it was stated:

> "The Sub-Committee examined in detail the legal issues raised by the delegations of Syria and Egypt, and its considered views are recorded in this report. There is, however, no doubt that it would be advantageous and more satisfactory from all points of view if an advisory opinion on these difficult and complex legal and constitutional issues were obtained from the highest international judicial tribunal." (Document A/AC.14/32 and Add. 1, 11 November 1947, para. 38.)

The "difficult and complex legal and constitutional issues" revolved around:

> "whether the General Assembly is competent to recommend either of the solutions proposed by the majority and by the minority respectively of the Special Committee, and whether it lies within the power of any Member or group of Members of the United Nations to implement any of the proposed solutions without the consent of the people of Palestine" (*ibid.*, para. 37).

Several such proposals were considered. None was adopted. The Sub-Committee in its report, some two weeks before the vote on the Partition Resolution, recognized that:

> "A refusal to submit this question for the opinion of the International Court of Justice would amount to a confession that the General Assembly is determined to make recommendations in a certain direction, not because those recommendations are in accord with the principles of international justice and fairness, but because the majority of the representatives desire to settle the problem in a certain manner, irrespective of what the merits of the question or the legal obligations of the parties might be. Such an attitude will not serve to enhance the prestige of the United Nations. . . ." (*Ibid.*, para. 40.)

The clear and well-reasoned arguments calling for clarification and elucidation of the legal issues fell on deaf ears. The rush to vote proceeded without clarifying the legal aspects. In this context, it is relevant to recall that the Partition Resolution fully endorsed referral of "any dispute relating to the application or

interpretation"[1] of its provisions to the International Court of Justice. The referral "shall be at the request of either party"[2]. Needless to say, this avenue was also never followed.

Thus, the request by the General Assembly for an advisory opinion, as contained in resolution 10/14, represents the first time ever that the International Court of Justice has been consulted by a United Nations organ with respect to any aspect regarding Palestine. The Advisory Opinion has great historical significance as a landmark which will definitely add to its legal value.

II. The International Legal Status of the Occupied Palestinian Territory

2.1. The international legal status of the Palestinian Territory (paras. 70-71 of the Advisory Opinion), in my view, merits more comprehensive treatment. A historical survey is relevant to the question posed by the General Assembly, for it serves as the background to understanding the legal status of the Palestinian Territory on the one hand and underlines the special and continuing responsibility of the General Assembly on the other. This may appear as academic, without relevance to the present events. The present is however determined by the accumulation of past events and no reasonable and fair concern for the future can possibly disregard a firm grasp of past events. In particular, when on more than one occasion, the rule of law was consistently side-stepped.

The point of departure, or one can say in legal jargon, the critical date, is the League of Nations Mandate which was entrusted to Great Britain. As stated in the Preamble of the Mandate for Palestine, the United Kingdom undertook "to exercise it on behalf of the League of Nations"[3]. The Mandate must be considered in the light of the Covenant of the League of Nations. One of the primary responsibilities of the Mandatory Power was to assist the peoples of the territory to achieve full self-government and independence at the earliest possible date. Article 22, paragraph 1, of the Covenant stipulated that the "well-being and development of such peoples form a sacred trust of civilisation". The only limitation imposed by the League's Covenant upon the sovereignty and full independence of the people of Palestine was the temporary tutelage entrusted to the Mandatory Power. Palestine fell within the scope of Class A Mandates under Article 22, paragraph 4, of the Covenant, which provided that:

> "Certain communities, formerly belonging to the Turkish Empire, have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a mandatory power until such time as they are able to stand alone."

The conventional wisdom and the general expectation were such that when the stage of rendering administrative advice and assistance had been concluded and the Mandate had come to an end, Palestine would be independent as of that date, since its provisional independence as a nation was already legally acknowledged by the Covenant. Moreover, the Covenant clearly differentiated between the communities which formerly belonged to the Turkish Empire, and other territories. Regarding the latter, the Mandatory Power was held responsible for the complete administration of the Palestinian territory and was not confined to administrative

[1] No. 181 (II), resolution adopted on the report of the *Ad Hoc* Committee on the Palestinian Question (29 November 1947), Chap. 4, para. 2.

[2] *Ibid.*

[3] Preamble, CMD. No. 1785 (1923), reprinted in report of the United Nations Special Committee on Palestine (UNSCOP report).

advice and assistance[4]. These distinct arrangements can be interpreted as further recognition by the Covenant of the special status of the former Turkish territories which included Palestine.

In point of fact, the report submitted by Sub-Committee 2 to the *Ad Hoc* Committee on the Palestinian question in 1947 shed more light on the status of Palestine. The report gave the conclusion that:

> "the people of Palestine are ripe for self-government and that it has been agreed on all hands that they should be made independent at the earliest possible date. It also follows, from what has been said above, that the General Assembly is not competent to recommend, still less to enforce, any solution other than the recognition of the independence of Palestine." (A/AC.14/32, and Add. 1, 11 November 1947, para. 18.)

The Sub-Committee further submitted the following views:

> "It will be recalled that the object of the establishment of Class A Mandates, such as that for Palestine, under Article 22 of the Covenant, was to provide for a temporary tutelage under the Mandatory Power, and one of the primary responsibilities of the Mandatory was to assist the peoples of the mandated territories to achieve full self-government and independence at the earliest opportunity. It is generally agreed that that stage has now been reached in Palestine, and not only the United Nations Special Committee on Palestine but the Mandatory Power itself agree that the Mandate should be terminated and the independence of Palestine recognized." (*Ibid.*, para. 15.)

2.2. The Court has considered the legal nature of mandated territories in both 1950 *(International Status of South West Africa, Advisory Opinion)*, and in 1971 *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion)*, and laid down both the conceptual philosophy and the legal parameters for defining the legal status of former mandated territories. The dicta of the Court emphasized the special responsibility of the international community. It is to be noted that, in the setting up of the mandates system, the Court held that

> "two principles were considered to be of paramount importance: the principle of *non-annexation* and the principle that the well-being and development of such peoples form '*a sacred trust of civilization*'" (*I.C.J. Reports 1950*, p. 131; emphasis added).

The two fundamental principles enunciated by the Court in 1950 apply to all former mandated territories which have not gained independence. They remain valid today for the Occupied Palestinian Territory. The territory cannot be subject to annexation by force and the future of the Palestinian people, as "a sacred trust of civilization", is the direct responsibility and concern of the United Nations.

2.3. It should be borne in mind that General Assembly resolution 181 (II) of 29 November 1947, which partitioned the territory of mandated Palestine, called for, *inter alia*, the following steps to be undertaken:

(i) the termination of the Mandate not later than 1 August 1948;

(ii) the establishment of two independent States, one Arab and one Jewish;

[4] Covenant of the League of Nations, Article 22.

(iii) the period between the adoption of the Partition Resolution and "the establishment of the independence of the Arab and Jewish States shall be a transitional period".

On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was "by virtue of [Israel's] natural and historic right" and based "on the strength of the resolution of the United Nations General Assembly"[5]. The independence of the Palestinian Arab State has not yet materialized.

That there "shall be a transitional period" pending the establishment of the two States is a determination by the General Assembly within its sphere of competence and should be binding on all Member States as having legal force and legal consequences[6]. This conclusion finds support in the jurisprudence of the Court.

The Court has held in the *Namibia* case that when the General Assembly declared the Mandate to be terminated,

> "'South Africa has no other right to administer the Territory' . . . This is not a finding on facts, but the formulation of a legal situation. For it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 50, para. 105.)

The Court, moreover, has previously held, in the *Certain Expenses* case, that the decisions of the General Assembly on "important questions" under Article 18, "have dispositive force and effect" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163).

The legal force and effect of a General Assembly resolution adopted by the General Assembly "within the framework of its competence" is therefore well established in the Court's jurisprudence. On that basis, it is submitted that two conclusions appear imperative:

(a) the United Nations is under an obligation to pursue the establishment of an independent Palestine, a fact which necessitates that the General Assembly's special legal responsibility not lapse until the achievement of this objective;

(b) the transitional period referred to in the Partition Resolution serves as a legal nexus with the Mandate. The notion of a transitional period carrying the responsibilities emanating from the Mandate to the present is a political reality, not a legal fiction, and finds support in the dicta of the Court, in particular, that former mandated territories are the "sacred trust of civilization" and "cannot be annexed". The stream of General Assembly and Security Council resolutions on various aspects of the question of Palestine provides cogent proof that this notion of a transitional period is generally, albeit implicitly, accepted.

2.4. The legal status of the Occupied Palestinian Territories cannot be fully appreciated without an examination of *Israel's contractual undertakings* to respect the territorial integrity of the territory, and to withdraw from the occupied territories. The withdrawal and the territorial integrity injunctions are based on

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[5] *Laws of the State of Israel*, Vol. I, p. 3.

[6] Moreover, Judge Weeramantry, in his dissenting opinion in the *East Timor* case, considered that "a resolution containing a decision within its proper sphere of competence may well be *productive of legal consequences*" (*East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 186; emphasis added).

Security Council resolution 242 (1967) which is universally considered as the basis for a just, viable and comprehensive settlement. Resolution 242 is a multidimensional resolution which addresses various aspects of the Arab-Israeli dispute. I will focus only on the territorial dimension of resolution 242: the resolution contained two basic principles which defined the scope and the status of the territories occupied in 1967 and confirmed that occupied territories have to be "de-occupied": resolution 242 emphasized the inadmissibility of acquisition of territory by war, thus prohibiting the annexation of the territories occupied in the 1967 conquest. It called for the withdrawal of Israeli armed forces from the territories occupied in the conflict. On 22 October 1973, the Security Council adopted resolution 338 (1973) which reiterated the necessity to implement resolution 242 "in all of its parts" (S/Res/338 of 22 October 1973, para. 2).

Following resolution 242, several undertakings to end the Israeli military occupation, while reserving the territorial integrity of the West Bank and Gaza, were made by Israel:

(a) The Camp David Accords of 17 September 1978, in which Israel agreed that the basis for a peaceful settlement of the conflict with its neighbours is United Nations Security Council resolution 242 in all its parts.

(b) The Oslo Accord, signed in Washington, D.C. on 13 September 1993, which was a bilateral agreement between Israel and Palestine. Article IV of the Oslo Accord provides that "the two sides view the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period".

(c) The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C. on 28 September 1995, reiterated the commitment to respect the integrity and status of the Territory during the interim period. In addition, Article XXXI (7) provided that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations".

Thus Israel undertook to carry out the following obligations:

(i) to withdraw in conformity with resolution 242;

(ii) to respect the territorial integrity of the West Bank and the Gaza Strip; and

(iii) to refrain from taking any step that would change the status of the West Bank and Gaza.

These undertakings were contractual and are legally binding on Israel.

2.5. Yet, notwithstanding the general prohibition against annexing occupied territories, the dicta of the Court on the legal nature of former mandatory territories, and in clear contravention of binding bilateral undertakings, on 14 April 2004, the Prime Minister of Israel addressed a letter to the President of the United States. Attached to the letter is a Disengagement Plan which one has to interpret as authoritatively reflecting Israel's intention to annex Palestinian territories. The Disengagement Plan provides that

> "it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel".

The clear undertakings to withdraw and to respect the integrity and status of the West Bank and Gaza legally debar Israel from infringing upon or altering the international legal status of the Palestinian territory. The construction of the wall, with its chosen route and associated régime, has to be read in the light of the Disengagement Plan. It is safe to assume that the construction was conceived with a view to annexing Palestinian territories, "cities, towns and villages" in the West Bank which "will be part of the State of Israel". The letter of the Prime Minister of Israel was dated 14 April 2004, over two months before the delivery of the Advisory Opinion.

The Court reached the correct conclusion regarding the characterization of the wall when it held that:

> "the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation" (Advisory Opinion, para. 121).

It is submitted that this finding should have been reflected in the *dispositif* with an affirmation that the Occupied Palestinian Territory cannot be annexed. It would also have been appropriate, in my view, to refer to the implications of the letter of the Prime Minister of Israel and its attachments and to underline that what it purports to declare is a breach of Israel's obligations and contrary to international law.

III. The Law of Belligerent Occupation

The Court was requested by the General Assembly to urgently render an advisory opinion on "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory" (A/RES/ES-10/14(A/ES-10/L.16). The focus of the request evolves around the law of belligerent occupation. As already stated, I do concur with the reasoning and conclusions in the Advisory Opinion. I feel constrained, however, to emphasize and elaborate on some points:

(a) the prolonged occupation;

(b) the scope and limitations of the principle of military necessity;

(c) the grave breaches of international humanitarian law; and

(d) the right to self-determination.

3.1. The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted. The Court recalls in paragraph 87, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (resolution 2625 (XXV)), which provides an agreed interpretation of Article 2 (4). The Declaration "emphasized that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal.'" (Advisory Opinion, para. 87). The general principle that an illegal act cannot produce legal rights — *ex injuria jus non oritur* — is well recognized in international law.

The Israeli occupation has lasted for almost four decades. Occupation, regardless of its duration, gives rise to a myriad of human, legal and political problems. In dealing with prolonged belligerent occupation,

international law seeks to "perform a holding operation pending the termination of the conflict"[7]. No one underestimates the inherent difficulties that arise during situations of prolonged occupation. A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation.

Professor Christopher Greenwood provided a correct legal analysis which I share. He wrote:

> "Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*."[8]

Both Israelis and Palestinians are subjected to untold sufferings. Both Israelis and Palestinians have a right to live in peace and security. Security Council resolution 242 affirmed the right "of every State in the area . . . to live in peace within secure and recognized boundaries free from threats or acts of force" (S/Res/242 (1967), para. 1 (ii)). These are solemn reciprocal rights which give rise to solemn legal obligations. The right to ensure and enjoy security applies to the Palestinians as well as to the Israelis. Security cannot be attained by one party at the expense of the other. By the same token of corresponding rights and obligations, the two sides have a reciprocal obligation to scrupulously respect and comply with the rules of international humanitarian law by respecting the rights, dignity and property of the civilians. Both sides are under a legal obligation to measure their actions by the identical yardstick of international humanitarian law which provides protection for the civilian population.

The Court has very clearly held, in the *Legality of the Threat or Use of Nuclear Weapons* case, that

> "The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use." (*Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 257, para. 78.)

The fact that occupation is met by armed resistance cannot be used as a pretext to disregard fundamental human rights in the occupied territory. Throughout the annals of history, occupation has always been met with armed resistance. Violence breeds violence. This vicious circle weighs heavily on every action and every reaction by the occupier and the occupied alike.

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[7] C. Greenwood, "The Administration of Occupied Territory in International Law", *International Law and the Administration of Occupied Territories*, (Ed. by E. Playfair, Clarendon Press, Oxford, 1992), pp. 262-263.

[8] *Ibid.*

The dilemma was pertinently captured by Professors Richard Falk and Burns Weston when they wrote

> "the occupier is confronted by threats to its security that arise . . . primarily, and especially in the most recent period, from a pronounced and sustained failure to restrict the character and terminate its occupation so as to restore the sovereign rights of the inhabitants. Israeli occupation, by its substantial violation of Palestinian rights, has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability which in turn provokes the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants."[9]

I wholeheartedly subscribe to the view expressed by Professors Falk and Weston, that the breaches by both sides of the fundamental rules of humanitarian law reside in "the illegality of the Israeli occupation regime itself". Occupation, as an illegal and temporary situation, is at the heart of the whole problem. The only viable prescription to end the grave violations of international humanitarian law is to end occupation.

The Security Council has more than once called for ending the occupation. On 30 June 1980, the Security Council reaffirmed "the overriding necessity for ending the prolonged occupation of Arab territories occupied by Israel since 1967, including Jerusalem" (S/Res/476 (1980). Notwithstanding this clarion call, the Palestinians are still languishing under a heavy-handed, prolonged occupation.

3.2. The Court, in paragraph 135, rejected the contention that the principle of military necessity can be invoked to justify the construction of the wall. The Court held that:

> "However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations." (Advisory Opinion, para. 135.)

I fully share this finding. Military necessities and military exigencies could arguably be advanced as justification for building the wall had Israel proven that it could perceive no other alternative for safeguarding its security. This, as the Court notes, Israel failed to demonstrate. A distinction must be drawn between building the wall as a security measure, as Israel contends, and accepting that the principle of military necessity could be invoked to justify the unwarranted destruction and demolition that accompanied the construction process. Military necessity, if applicable, extends to the former and not the latter. The magnitude of the damage and injury inflicted upon the civilian inhabitants in the course of building the wall and its associated régime is clearly prohibited under international humanitarian law. The destruction of homes, the demolition of the infrastructure, and the despoilment of land, orchards and olive groves that has accompanied the construction of the wall cannot be justified under any pretext whatsoever. Over 100,000 civilian non-combatants have been rendered homeless and hapless.

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[9] Falk & Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza", *International Law and the Administration of Occupied Territories* (ed. by E. Playfair, Clarendon Press, Oxford, 1992), Chap. 3, pp. 146-147.

It is a fact that the law of belligerent occupation contains clauses which confer on the occupying Power a limited leeway for military necessities and security. As in every exception to a general rule, it has to be interpreted in a strict manner with a view to preserving the basic humanitarian considerations. The Secretary-General reported to the General Assembly on 24 November 2003 that he recognizes "Israel's right and duty to protect its people against terrorist attacks. However, that duty should not be carried out in a way that is in contradiction to international law." (A/ES-10/248, para. 30.)

The jurisprudence of the Court has been consistent. In the 1948 *Corfu Channel* case, the Court referred to the core and fabric of the rules of humanitarian law as "elementary considerations of humanity, even more exacting in peace than in war" (*Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 22). In the case concerning *Legality of the Threat or Use of Nuclear Weapons* case, the Court held that

> "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 257, para. 79).

In the final analysis, I have reached the same conclusion as Professor Michael Schmitt, that

> "Military necessity operates within this paradigm to prohibit acts that are not militarily necessary; it is a principle of limitation, not authorization. In its legal sense, military necessity justifies nothing." [10]

The Court reached the same conclusion. The Court held that

> "In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction." (Advisory Opinion, para. 140.)

3.3 It is relevant to recall, moreover, that the reading of the reports by the two Special Rapporteurs, John Dugard and Jean Ziegler, leaves no doubt that as an occupying Power, Israel has committed grave breaches. The pattern and the magnitude of the violations committed against the non-combatant civilian population in the ancillary measures associated with constructing the wall, are, in my view, "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" (Fourth Geneva Convention, Art. 147). In the area of extending protection to civilians, the rules of international humanitarian law have progressively developed since the conclusion of the Geneva Conventions and Additional Protocols. It is submitted that the Court should have contributed to the development of the rules of *jus in bello* by characterizing the destruction committed in the course of building the wall as grave breaches.

3.4. The Court underlined the paramount importance of the right to self-determination in our contemporary world and held in paragraph 88: "The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29)." Moreover, the Court notes that the route chosen for the wall and the measures taken "severely impedes the exercise by the Palestinian people of its right to self-determination, and is

[10] M. N. Schmitt, "Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict" (1998), 19 *Michigan Journal of International Law*, p. 1080.

therefore a breach of Israel's obligation to respect that right" (Advisory Opinion, para. 122). This legally authoritative dictum, which has my full support, was confined to the reasoning. The legal consequences that flow for all States from measures which severely impede the exercise by the Palestinians of an *erga omnes* right, should, in my view, have been included in the *dispositif*.

Conclusion

I now approach my final comment. It is a reflection on the future. The Court, in paragraph 162, observes that in its view

> "this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)" (Advisory Opinion, para. 162).

This finding by the Court reflects a lofty objective that has eluded the international community for a very long time. Since 22 November 1967, all efforts have been aimed at ensuring the implementation of Security Council resolution 242 (1967) which was adopted unanimously. In the course of its 37-year lifespan, Security Council resolution 242 has been both praised and vilified. Yet detractors and supporters alike agree that the balance in its provisions represent the only acceptable basis for establishing a viable and just peace. The Security Council, in the aftermath of the 1973 armed conflict, adopted resolution 338 (1973), which called upon the parties to start immediately after the ceasefire *"the immediate implementation of 242 (1967) in all of its parts"* (emphasis added). The obligations emanating from these resolutions are obligations of result of paramount importance. They are synallagmatic obligations in which the obligation of each party constitutes the raison d'être of the obligation of the other. It is legally wrong and politically unsound to transform this obligation of result into a mere obligation of means, confining it to a negotiating process. Any attempt to tamper with such solemn obligation would not contribute to an outcome based on a solid foundation of law and justice.

The establishment of "a just and lasting peace", as called for in Security Council resolution 242, necessitates the full implementation of the corresponding obligations by the two parties. The Advisory Opinion should herald a new era as the first concrete manifestation of a meaningful administration of justice related to Palestine. It is hoped that it will provide the impetus to steer and direct the long-dormant quest for a just peace.

(Signed) Nabil ELARABY.

SEPARATE OPINION OF JUDGE OWADA

The issue of judicial propriety in exercising jurisdiction in advisory proceedings is a factor to be examined by the Court proprio motu, *if necessary — Relevance of the existence of a bilateral dispute in the subject-matter of the request as such is not to be a bar for the Court in exercising jurisdiction, but nonetheless a factor to be considered in determining how the Court should deal with the subject-matter of the request without impingeing upon the problem of regulating the very dispute between the parties — The Court should have approached the issue of exercising judicial propriety, not simply in relation to the question as to whether it should comply with the request for an advisory opinion, but also in relation to the question as to how it should exercise jurisdiction with a view to ensuring fairness in the administration of justice in a case which clearly is related to a bilateral dispute, including the issue of appointing a judge* ad hoc *— Consideration of fairness in the administration of justice requires equitable treatment of the positions of both sides involved in the subject-matter in terms of the assessment both of facts and of law involved — Condemnation of the tragic circle of indiscriminate mutual violence perpetrated by both sides against innocent civilian population should be an important segment of the Opinion of the Court.*

1. I concur with the conclusions of the Opinion of the Court both on the preliminary issues (jurisdiction and judicial propriety) and on most of the points belonging to the merits of the substantive issues involved. Nevertheless, not only have I some disagreements on certain specific points in the Opinion, but I have some serious reservations about the way the Court has proceeded in this case. While I acknowledge that the way in which the Court has proceeded with the present case has to a large extent been made inevitable under the somewhat extraordinary and unique circumstances of the case that are not always attributable to the responsibility of the Court, I feel it incumbent upon me to make my position clear, by pointing to some of the problematic aspects of the way in which the Court has proceeded in the present case.

2. The Court has reached its conclusions on the preliminary issues on jurisdiction and on judicial propriety of exercising this jurisdiction primarily on the basis of the statements put forward by the participants in the course of its written and oral proceedings. The reasons for the Court to arrive at these conclusions are set out in paragraphs 24-67. These, as such, raise no major disagreement on my part. However, I believe that the issue of jurisdiction and especially the issue of judicial propriety is a matter that the Court should examine, *proprio motu* if necessary, in order to ensure that it is not only *right* as a matter of law but also *proper* as a matter of judicial policy for the Court as a judicial body to exercise jurisdiction in the concrete context of the case. This means, at least to my mind, that the Court would be required to engage in an in-depth scrutiny of all aspects of the particular circumstances of the present case relevant to the consideration of the case, if necessary going beyond what has been argued by the participants. One of such aspects of the present case is the implication of the existence of a bilateral dispute in the subject-matter of the request for an advisory opinion.

3. The original Statute of the Permanent Court of International Justice contained no express provisions relating to advisory jurisdiction. Only the Covenant of the League of Nations, in its Article 14, stipulated that "[t]he Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly". It was this provision that came to form the legal basis for the exercise of advisory function by the Permanent Court of International Justice.

4. While the purport of this provision according to the intention of the founding fathers of the League does not appear to have been entirely clear nor unified, one of the points that clearly emerge from the legislative history of the Covenant is that the purpose of the advisory function of the Permanent Court consisted

from the beginning in aiding the League in the peaceful settlement of a concrete dispute before the Council of the League, in particular in the context of the procedures provided for in Articles 12 to 16 of the Covenant[1].

5. When the Rules of Court were drafted in 1922 following the establishment of the Permanent Court, four articles (71-74) were consecrated to advisory procedure. They affirmed the "judicial character" of the advisory function of the new Court and paved the way for the later fuller assimilation of advisory to contentious procedure[2]. Indeed, the Report of the Committee [of the Permanent Court of International Justice], appointed on 2 September 1927, stated as follows:

> "The Statute does not mention advisory opinions, but leaves to the Court the entire regulation of its procedure in the matter. The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action. Such prestige as the Court to-day enjoys as a judicial tribunal is largely due to the amount of its advisory business and the judicial way in which it has dealt with such business. In reality, where there are . . . contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the case comes before the Court, and even this difference may virtually disappear, as it did in the Tunisian case. So the view that advisory opinions are not binding is more theoretical than real." (*P.C.I.J., Series E, No. 4*, p. 76.)

6. In fact, when the Permanent Court declined to exercise jurisdiction to give a requested advisory opinion in the *Status of Eastern Carelia* case (*P.C.I.J., Series B, No. 5*), the main rationale of this decision lay precisely on this point. The specific issue referred to the Court was whether

> "Articles 10 and 11 of the Treaty of Peace between Finland and Russia [of 1920] and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein" (*ibid.*, p. 6).

In other words, it arose in the context of a dispute between Finland and Russia involving this issue — a matter which Finland asked the League of Nations to take up. The Council in its resolution expressed its "willing[ness] to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree" (*ibid.*, p. 23). It was, however, due to the circumstances where the Russian Government declined the request from the Estonian Government for it to "consent to submit the question to the Council in conformity with Article 17 of the Covenant" (*ibid.*, p. 24) and where the Finnish Government again brought the matter before the Council, that the Council decided to request the advisory opinion in question.

7. Against this background, the Permanent Court stated as follows to clarify its position:

> "There has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. *It is unnecessary in the present case to deal with this topic.*" (*P.C.I.J., Series B, No. 5*, p. 27; emphasis added.)

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[1] See, in particular, Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (1973) at p. 9.

[2] *Ibid.*, at p. 14.

After making this point clear, the Permanent Court continued as follows:

> "It follows from the above that the opinion which the Court has been requested to give bears on an actual dispute between Finland and Russia. *As Russia is not Member of the League of Nations, the case is one under Article 17 of the Covenant* . . . the Members of the League . . . having accepted the Covenant, are under the obligation resulting from the provisions of this part dealing with the pacific settlement of international disputes. As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. *The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent.* Such consent, however, has never been given by Russia." (*Ibid.*, pp. 27-28; emphasis added.)[3]

It is clear from this passage that the main rationale of the Permanent Court in declining the exercise of jurisdiction in the *Eastern Carelia* case was not the existence of a dispute relating to the subject-matter of the request between the parties, but rather the fact that one of the parties to the dispute did not give its consent to a "solution according to the methods provided for in the Covenant".

8. When the International Court of Justice was reconstituted as the institutional successor to the Permanent Court of International Justice, and incorporated into the United Nations system as its principal judicial organ, no drastic change was introduced in the new Statute of the International Court of Justice relating to its functions or to its constitution in this respect. Since then, advisory function of the Court, as the secondary but important function of the Court, has been exercised by the Court in line with the course laid down by its predecessor, the Permanent Court of International Justice, in the days of the League as described above.

9. Given this background, and in light of the case law accumulated in the course of years since the establishment of the International Court of Justice on the questions of jurisdiction of the Court in advisory proceedings and of propriety of its exercise, it is my view that the Court is right in its conclusion in the present case that the existence of a dispute on a bilateral basis should not be a bar to the Court in giving the advisory opinion requested.

10. While the existence of a bilateral dispute thus should not exclude the Court from exercising jurisdiction in advisory proceedings as a matter of judicial propriety, however, it is my view that the existence of a bilateral dispute should be a factor to be taken into account by the Court in determining the extent to which, and the manner in which, the Court should exercise jurisdiction in such advisory proceedings. In this respect, I am of the view that the Court has drawn too facile an analogy between the present case and the past cases of advisory opinion and especially the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*. Given the intricacies of the present case, I submit that this approach of applying the principles drawn from the past precedents automatically to the present situation is not quite warranted.

11. Especially in the *Namibia* case, the point in issue that formed the basis for the request for an advisory opinion was the "legal consequences . . . of the continued presence of South Africa in Namibia . . .

[3] Article 17 of the Covenant provides:

> "In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council."

notwithstanding Security Council resolution 276 (1970)". In spite of the similarity in language in the formulation of the request, the basis for this request was very different from the present one. In the *Namibia case*, the Court was asked to give an opinion on the legal significance of the action taken by the United Nations in terminating the South African Mandate over South West Africa and its legal impact upon the status of South Africa in that territory. If there was a legal controversy or a dispute, it was precisely the one between the United Nations and the State concerned. By contrast, what is in issue in the present situation centres on a situation created by the action of Israel vis-à-vis Palestine in relation to the Occupied Palestinian Territory. It is undeniable that there is in this case an underlying legal controversy or a dispute between the parties directly involved in this situation, while at the same time, as the Court correctly points out, it concerns a matter between the United Nations and Israel since the legal interest of the United Nations is legitimately involved.

12. This of course is not to say that the Court should decline for this reason the exercise of jurisdiction in the present case. It does mean, however, that the question of judicial propriety should be examined taking into account this reality, and on the basis of the jurisprudence in more pertinent cases. I believe the closest to the present case probably is the *Western Sahara, Advisory Opinion* case, in the sense that there was in that case clearly an underlying legal controversy or a dispute between the parties involved. However, even that case does not offer a completely analogous precedent, from which the Court can draw its conclusion. In the *Western Sahara* case, the Court stated:

> "The object of the General Assembly has *not* been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court *an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory*." (*I.C.J. Reports 1975*, pp. 26-27, para. 39; emphasis added.)

In the present case, the presumed objective of the General Assembly in requesting an advisory opinion would not seem to be the latter so much as the former in the two examples given in this passage.

13. Thus, acknowledging the fact that in the present case there is this undeniable aspect of an underlying legal controversy or a dispute between the parties involved, and keeping this aspect clearly in mind, I wish to state that the critical test for judicial propriety in exercising jurisdiction of the Court, which it undoubtedly has, should lie, not in whether the request is related to a concrete legal controversy or dispute in existence, but in whether "to give a reply would have *the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent*" (*I.C.J. Reports 1975*, p. 25, para. 33; emphasis added). To put it differently, the critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists between Israel and Palestine.

14. The reasoning that I have offered above leads me to the following two conclusions. First, the fact that the present case contains an aspect of addressing a bilateral dispute should not prevent the Court from exercising its competence. Second, however, this fact should have certain important bearing on the whole proceedings that the Court is to conduct in the present case, in the sense that the Court in the present advisory proceedings should focus its task on offering its objective findings of law to the extent necessary and useful to the requesting organ, the General Assembly, in carrying out its functions relating to this question, rather than adjudicating on the subject-matter of the dispute between the parties concerned.

15. It should be recalled that, even when deciding to exercise its advisory function, this Court has consistently maintained the position that it should remain faithful to "the requirements of its judicial character". Thus in the *Western Sahara* case the Court declared:

> "Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character. *In exercising this discretion, the International Court of Justice,* like the Permanent Court of International Justice, *has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions.*" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21, para. 23; emphasis added.)

16. One of such *requirements* for the Court as a judicial body is the maintenance of fairness in its administration of justice in the advisory procedure in the midst of divergent positions and interests among the interested parties. To put it differently, it must be underlined that the Court's discretion in advisory matters is not limited to the question of whether to comply with a request. It also embraces questions of advisory procedure[4]. This requirement acquires a special importance in the present case, as we accept the undeniable fact as developed above that the present case does relate to an underlying concrete legal controversy or a dispute, despite my own conclusion that it is proper for the Court to exercise its jurisdiction in the present case.

17. Article 68 of the Statute of the Court prescribes that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." Rules of Court in its Part IV (Arts. 102-109) elaborates this provision of the Statute. Particularly relevant in this context is Article 102, paragraph 3 of which provides that "[w]hen an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provision of these Rules concerning the application of that Article."

18. In the *Namibia* case, South Africa made an application for the appointment of a judge *ad hoc* to sit in the present proceedings in accordance with this provision. Although the Court in its Order of 29 January 1971 decided to reject this application (*I.C.J. Reports 1971*, p. 12), it was met with well-argued dissenting views on this point (*ibid.*, p. 308; p. 324). By contrast, in the *Western Sahara* case the Court took a different position. In response to a request by Morocco for the appointment of a judge *ad hoc* in accordance with Article 89 (i.e., present Art. 102) of the Rules of Court, the Court found that Morocco was entitled to choose a judge *ad hoc* in the proceedings. (A similar request by Mauritania on the other hand was rejected.) (*I.C.J. Reports 1975*, p. 6.)

19. The procedure for the appointment of a judge *ad hoc* is set in motion by the application of a State which claims that "the request for the advisory opinion relates to a legal question actually pending between two or more States" (Rules of Court, Art. 102). It is my view that in light of the precedents noted above, Israel in its special position in the present case would have been justified in making an application to choose a judge *ad hoc*. For whatever reason, Israel did not choose this course of action. It if had done so, the task of the Court in maintaining the essential requirement for fairness in the administration of justice would have been greatly enhanced. It goes without saying that such a course of action would have complicated the situation, due to the fact that the other party to this dispute, Palestine, is an entity which is not recognized as a State for the purpose of the Statute of the Court. What would happen then, if one of the parties directly interested is in a position of appointing a judge *ad hoc*, while the other is not. Fairness in the administration of justice could be questioned

[4] Michla Pomerance, *op. cit.*, at p. 281.

from this angle. While I do not propose to offer my own conclusion to this intractable but hypothetical problem, what I wish to point out is that this factor is one of the important aspects of the present case that could have been considered by the Court in deciding on the question of judicial propriety of whether, and if so how far, the Court should exercise its jurisdiction in the unique circumstances of this case.

20. Be that as it may, it is established that even in contentious proceedings the absence of one of the parties in itself does not deprive the Court of its jurisdiction to proceed (Statute of the Court, Art. 53), but that the Court has to maintain its fairness in the administration of justice as a court of justice. Thus, in relation to the question of the law to be proved and applied, the Court stated in the cases concerning *Fisheries Jurisdiction* as follows:

> "The Court . . . as an international judicial organ, is deemed to take judicial notice of international law and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974*, p. 181, para. 18.)

In relation to the question of the facts to be clarified, the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua, (Merits)* stated that:

> "in principle [it] is not bound to confine its consideration to the material formally submitted to it by the parties (cf. *Brazilian Loans, P.C.I.J. Series A, No. 20/21*, p. 124; *Nuclear Tests, I.C.J. Reports 1974*, pp. 263-264, paras. 31, 32)" (*I.C.J. Reports 1986*, p. 25, para. 30).

It went on to state as follows:

> "The Court . . . has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing 'it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts' (*Nuclear Tests, I.C.J. Reports 1974*, p. 263, para. 31; p. 468, para. 32.). On the other hand, the Court has to emphasize that the equality of the parties to the dispute must remain the basic principle for the Court." (*I.C.J. Reports 1986*, pp. 25-26, para. 31.)

21. This principle governing the basic position of the Court should be applicable to advisory proceedings as it is applicable to contentious proceedings. Indeed, it may even be arguable that this principle is applicable *a fortiori* to advisory proceedings, in the sense that in advisory proceedings as distinct from contentious proceedings it cannot be said, at any rate in the legal sense, that "[t]he absent party . . . forfeits the opportunity to counter the factual allegations of its opponent" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 25, para. 30). In advisory proceedings no State, however interested a party it may be, is under the obligation to appear before the Court to present its case.

22. On this point of facts and information relating to the present case, it is undoubtedly true, as the present Opinion states, that

> "the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of the wall but also on its humanitarian and socio-economic impact on the Palestinian population" (Advisory Opinion, para. 57).

Indeed, there is ample material, in particular, about the humanitarian and socio-economic impacts of the construction of the wall. Their authenticity and reliability is not in doubt. What seems to be wanting, however, is the material explaining the Israeli side of the picture, especially in the context of why and how the construction of the wall as it is actually planned and implemented is necessary and appropriate.

23. This, to my mind, would seem to be the case, in spite of the Court's assertion that "Israel's Written Statement, although limited to issues of jurisdiction and propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes" (Advisory Opinion, para. 57). In fact my point would seem to be corroborated by what the present Opinion itself acknowledges in relation to the argument of Israel on this issue. Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank, or as the report of the Secretary-General puts it, "to halt infiltration into Israel from the central and northern West Bank" (Advisory Opinion, para. 80). However, the Court, in paragraph 137 of the Opinion, simply states that "*from the material available to it, [it] is not convinced* that the specific course Israel has chosen for the wall was necessary to attain its security objectives" (emphasis added). It seems clear to me that here the Court is in effect admitting the fact that elaborate material on this point from the Israeli side is not available, rather than engaging in a rebuttal of the arguments of Israel on the basis of the material that might have been made available by Israel on this point. Again in paragraph 140 of the Opinion, the Court bases itself simply on "the material before it" to express *its lack of conviction* that "the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction".

24. In raising this point, it is not my purpose to dispute the factual accuracy of these assertions, or to question the conclusions arrived at on the basis of the documents and the material available to the Court. In fact it would seem reasonable to conclude on balance that the political, social, economic and humanitarian impacts of the construction of the wall, as substantiated by ample evidence supplied and documented in the course of the present proceedings, is such that the construction of the wall would constitute a violation of international obligations under various international instruments to which Israel is a party. Furthermore, these impacts are so overwhelming that I am ready to accept that no justification based on the "military exigencies", even if fortified by substantiated facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality.

25. However, that is not the point. What is crucial is that the above samples of quotations from the present Opinion testify to my point that the Court, once deciding to exercise jurisdiction in this case, should be extremely careful not only in ensuring the objective fairness in the result, but in seeing to it that the Court is seen to maintain fairness throughout the proceedings, whatever the final conclusion that we come to may be in the end.

26. The question put to the Court for its advisory opinion is the specific question of "the legal consequences arising from the construction of the wall being built by Israel" (General Assembly resolution A/ES-10/L.16). It concerns only that specific act of Israel. Needless to say, however, the Israeli construction of the wall has not come about in a vacuum; it is a part, albeit an extremely important part, of the whole picture of the situation surrounding the peace in the Middle East with its long history.

27. Naturally, this does not alter the fact that the request for an advisory opinion is focussed on a specific question and that the Court should treat this question, and this question only, without expanding the scope of its enquiry into the bigger question relating to the peace in the Middle East, including issues relating to the "permanent status" of the territories involved. Nevertheless, from the viewpoint of getting to an objective truth concerning the specific question of the construction of the wall in its complete picture and of ensuring fairness in the administration of justice in this case which involves the element of a dispute between parties directly involved, it seems of cardinal importance that the Court examine this specific question assigned to the Court, keeping in balance the overall picture which has formed the entire background of the construction of the wall.

28. It has always been an undisputed premise of the peace in the Middle East that the twin principles of "[w]ithdrawal of Israel armed forces from territories occupied in the [1967] conflict" and "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force" have to form the basis of the peace. Security Council resolution 242 (1967) has consecrated these principles in so many words. The "Roadmap", endorsed by Security Council resolution 1515 (2003), is a blueprint for proceeding on the basis of these principles.

29. If the Court found that the construction of the wall would go counter to this principle by impeding and prejudicing the realization of the principles, especially in the context of the customary rule of "the inadmissibility of the acquisition of territory by war" (Advisory Opinion, para. 117), it should state this. At the same time, the Court should remind the General Assembly that this was a principle couched in the context of the twin set of principles, both of which would have to be realized, at any rate in the context of a peace in the Middle East, side by side with each other.

30. As observed above, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. In response to this, the Court has confined itself to stating that "[i]n the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction" (Advisory Opinion, para. 140). It is certainly understood that the material available has not included an elaboration on this point, and that in the absence of such material, the Court has found no other way for responding to this situation. It may also be accepted that this argument of Israel, even if acknowledged as true as far as the Israeli motives were concerned, would not be a sufficient ground for justifying the construction of the wall as it has actually been drawn up and implemented. As the Court has demonstrated with a high degree of persuasiveness, the construction of the wall would still constitute a breach of Israel's obligations, inter alia, under the Hague Regulations Respecting the Laws and Customs of War on Land and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, unless cogent justifications are advanced for precluding the wrongfulness of this act. But the important point is that an in-depth effort could have been made by the Court, *proprio motu*, to ascertain the validity of this argument on the basis of facts and law, and to present an objective picture surrounding the construction of the wall in its entirety, on the basis of which to assess the merits of the contention of Israel.

31. It is to my mind important in this context that the issue of mutual resort to indiscriminate violence against civilian population should be looked at. Without going into the question of what is the causal relationship between the tragic acts of mutual violence resorted to by each of the parties and the question of whether the so-called terrorist attacks by Palestinian suicide bombers against the Israeli civilian population should be blamed as constituting a good enough ground for justifying the construction of the wall, I believe it is beyond dispute that this tragic circle of indiscriminate violence perpetrated by both sides against innocent civilian population of each other is to be condemned and rejected as totally unacceptable. While it is true that

this is not an issue expressly referred to as part of the specific question put to the Court, I believe it should only be natural that this factor be underlined as an important segment of the Opinion of the Court in dealing with the issue of the construction of the wall. This point to my mind is of particular relevance from the viewpoint that the Court should approach the subject-matter in a balanced way.

(Signed) Hisashi OWADA.